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JAMES H. MA...

159-103

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND CO., OF WEST VIRGINIA, PLAINTIFF IN ERROR.

VS.

JOHN B. LAIDLEY.

MOTION TO DISMISS THE WRIT OF ERROR,

—AND—

BRIEF OF JOHN B. LAIDLEY.

Walker's Quick Print, Huntington, W. Va.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND CO., OF WEST VIRGINIA, PLAINTIFF IN ERROR.

VS.

JOHN B. LAIDLEY.

MOTION TO DISMISS.

Chief Justice & Associate Justices

To the Honorable ~~Judges~~, of the Supreme Court of the United States:

Now comes the def't in error, John B. Laidley, in proper person, and respectfully moves this Honorable court to dismiss the writ of error, allowed in this case, to the judgment of the Supreme Court

of Appeals of West Va., entered on the 14th day of November A. D. 1890, upon the grounds:

1. That the order of the Supreme Court of Appeals of the State of West Va., entered on the 14th day of November, 1890, to which the writ of error was allowed was an order affirming an order of the circuit court of Cabell county made on the 12th day of Sept. 1890, overruling a motion for a new trial, and is not reviewable in the Supreme court of the United States upon writ of error, under the laws of the United States.

2. That the record does not set out or disclose any matter or thing of which this honorable court has jurisdiction under the constitution and laws of the United States.

Respectfully Submitted.

JOHN B. LAIDLEY.

NOTICE.

To the Central Land Company of West Virginia:

Take notice that on the 12 day of Dec 1892, by leave of court granted on the ———— day of ————1892, I shall submit the motions above set out to the Supreme Court of the United States, at Washington D. C. and ask said Court to pass upon the same.

Respectfully.

JOHN B. LAIDLEY.

RECORD.

References to the record in support of the motion to dismiss because the writ of error was improperly directed to the Judges of the Supreme Court of Appeals of the State of West Virginia, instead of the Judge of the circuit court of Cabell county.

Final Judgment (Sept. 12th., 1890) page 205—6

Order on Motion for New Trial 205.

" Overruling Motion, 205.

"Supreme Court affirming last above order 193–4

" " " leave to withdraw record same order 194

Certificate of Clerk showing that orginal copy of record together with copy of last above order is delivered out of Supreme court to Geo. I. Neal. } 258–9

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OF THE PRELIMINARY MOTION.

The writ of error was improperly directed to the Judges of the Supreme court of Appeals instead of the judge of the circuit court of Cabell county, State of West Virginia. A writ of error does not lie to an order of a State Supreme court affirming an order of the court of orginal jurisdiction granting or refusing a new trial.

Such an order is not a "judgment," it is only an incident of a trial. It is not a Final Judgment within the meaning and intent of the 25th section of the Judiciary Act. It does not award money to be paid or property to be delivered, or the change of title to real estate. It is not an adjudication of a controversy.

The writ should have been directed to the circuit court of Cabell county where the final judgment was rendered, and where the record remains. There is no record remaining in the Supreme court of Appeals of the State, as shown by its order affirming the order of the circuit court refusing a new trial It directs the withdrawal of the record.

138 U. S. 402 Beaupre' vs. Noyes.
3 Wall. 382 McGuire vs. the Common wealth.
4 Wall. 584 Sparrow vs. Strong,
113 U. S. 81 Polleys vs Black River Improvement co
144 " " 197 Rice vs. Sanger.
3 Wheat 246 Gelston vs. Hoyt.

POINTS AND AUTHORITIES RELIED ON IN SUPPORT OF THE MOTION TO DISMISS FOR WANT OF JURISDICTION:

FIRST.

If there be two grounds upon which the judgment of the state court can be sustained, one of which does not involve any question arising under the 25th section of the Judiciary Act, the Supreme court of the United States has no jurisdiction under that act to review the judgment.

The two grounds upon which the judgment of the circuit court can be sustained are—

I. That on a comparison of titles derived under a common source the plaintiff had the only true title the defendant's title being void.

II. That by the Hinton agreement made in the action of ejectment, the decision of the supreme court of appeals of W. Va. when rendered in the case referred to in the agreement was made conclusive of the action of ejectment, and that decision was subsequently rendered in favor of the plaintiff in the action.

138 U. S. 397 Beaupre vs. Noyes.
137 U. S. 300 Johnson vs. Risk.
138 U. S. 635 Cook vs. Calumet & C. C. Co.
144 U. S. 130 Haley vs. Breeze.
144 U. S. 458 Northern Pacific R. R. Co. vs. Ellis.
142 " " 73 Hammond vs. Johnson.
" " " 79 New Orleans vs. N. O. Water Wk's Co.

142 U.S. 122 Chever vs. Horner.
" " " 636 Del. & Phil. Nav. Co. vs. Reybald.
141 " " 679 Henderson Bridge Co. vs. Henderson.
139 " " 293 Wood M Co. vs. Skinner.
135 " " 244 Beatty vs. Beater.
133 " " 380 Hopkins vs. McClure.
132 " " 554 Hale vs. Akers.
129 " " 178 Warren vs. Brinkley.
127 " " 216 DeSaussare vs. Gaillard.
112 " " 123 Adams & Co. vs. B. & M. Co.
108 " " 105 Crosby vs. New Orleans.
111 " " 631 Santa Cruz vs. Santa Cruz.
111 " " 200 Choutou vs. Gibson.
92 " " 327 Brown vs. Atwell.
91 " " 578 McMannus vs. O'Sullivan.
81 " " 231 Kennebec vs. Portland.
20 Wall. 590 Murdock vs. Memphis.
125 U. S. 18 Water Wk's Co. vs. La. Sugar Refining Co.
16 Pet. 625 Mills vs. Brown.
11 Wall. 204 Ins. Co. vs. Treasurer.
13 " 257 Klinger vs. Mo.
10 Pet. 368 Crowell vs. Randall.
5 How. 317 Com'l. Bk. vs. Buckingham.
14 Pet. 49 Mitchell vs. Lenox.
10 Wall. 511 R. R. Co. vs. McClure.
14 " 9 Tenn. Bank vs. Bk. of La.
14 " 10 Palmer vs. Marston.
14 " 12 Sevier vs. Haskell.
96 U. S. 432 Murry vs. Charleston.
14 Wall 23 Kennebec, R. R. vs. Portland R. R.

The above citation of a few of the authorities, upon this point demonstrates how universally the principle has been acted upon.

SECOND.

If the rejected instruction set up a right claimed under Art. I, Sec. 10, of the Constitution of the United States, yet such RIGHT WAS NOT NECESSARILY ACTED UPON and DENIED, in refusing to give the instruction asked for by the plaintiff in error. The Circuit Court had only to decide that the instruction was informal and insufficient, in that, it excluded from the consideration of the jury material evidence, which had been submitted to them under the direction of the court, by the plaintiff in this action, viz., the evidence of the Hinton agreement; and the chancery record therein referred to; and the final degree of the State Supreme Court, upon appeal in the chancery suit stated above as an independent ground for sustaining the judgment.

The evidence so attempted to be excluded by the instruction asked for, was of itself sufficient to sustain the verdict, without reference to the alleged federal question; so that the instruction was properly refused upon technical grounds; at least it is not essential to sustain the verdict and judgment that the court should have acted upon the alleged federal question.

See the cases above cited, and the following cases:

138 U. S. 635 Cook Co. vs. Calumet & Chicago Canal Co.
137 " " 48 Texas Pacific Co., vs. Southern Pa. Co.
128 " " 132 Chappel vs. Bradshaw.
127 " " 216 DeSausure vs. Gaillard.

124 U. S. 391 Brooks vs. Missouri.
114 " " 133 Detroit vs. Guthard.
110 " " 57 Susquehanna vs. Boom Co.
116 " " 54 Simmerman vs Nebraska
111 " " 200 Chouteau vs Gibson
106 " " 97 Brown vs Colorado
71 " " Mississippi vs Rock
73 " " 258 Millingar vs Hartupee

When the case was decided upon the technical insufficiency of the pleadings, writ of error does not lie.

15 Wall. 639, Commercial Bank vs. Rochester.

THIRD.

But a right claimed under Art. I, Sec. 10, of the constitution of the United States, was not involved by the rendition of the Judgment of Sept. 12, 1890, by the circuit court of Cabell county, for the following reasons :

1. Because the construction of the State statute only was involved, in declaring the senior grant by S. H. G. Pennybacker to C. P. Huntington null and void.

5 How. 317 Commercial Bank vs Buckingham
12 How. 165 Railroad Company vs Marshall
6 Pet. 291 Green vs Neal
10 " 308 Crowell vs Randolph
11 " 167 McBride vs Hoey
10 Wheat 152 Elmendorf vs Taylor
12 Wall. 379 Knox vs Exchange Bank
10 Wall. 511 R R Co vs McClure
8 Wall. 44 Furman vs Nichol

4 Wall. 181 R. R. Co. vs. Rock.
107 U. S. 33 Burgess vs. Selligman.

2. Because the construction placed upon the statute (see plaintiff's instruction No. 5) was not in conflict with the construction placed upon the same statute by the prior Virginia decisions referred to in the defendant's instruction No. 1.

A question not necessarily arising upon this motion, and not necessarily involved in the judgment to be given on this motion. It goes to the merits of the case. Judge Snyder, who is a man of integrity, and who was an ornament to the Bench, in rendering the opinion on the first writ of error in this case, reviews Judge Johnson's opinion in Blair vs. Sayre and the Virginia decisions mentioned in defendant's instruction No. 1, and declares that the construction given is sound in principle and not in conflict with the Virginia decisions; and this opinion has been three times concurred in by a unanimous Bench in the supreme court of the state—by Judges Snyder, Green, Johnson and Wood and their successors, Lucas, Brannon, English and Holt.

30 W. Va., 505, Laidley vs. Land Co.
29 W. Va., 604, Blair vs. Sayre.
32 W. Va. 134, Central Land Co. vs. Laidley.

3. Finally, because the alleged contract—that is, the senior grant by S. H. G. Pennybacker to C. P.

Huntington—was declared null and void, not by the passage of a legislative act by the state of West Virginia, but by the judicial determination of the highest court of the state in the exercise of its legitimate jurisdiction; ascertaining that such alleged contract never did, in fact, exist; that it was void in its inception; a jurisdiction not limited by Art. 1, Sec. 10, of the Constitution of the United States, no matter if said decision were, in point of law, erroneous and a refusal to give effect to a valid deed, and a violation of the obligation of a contract. That clause of the Constitution prescrbes a limitation upon the power of the legislature, but not a limitation upon the general jurisdiction of state courts.

12 Wall., 379, Knox vs. Exchange Bank.
4 Wall., 177, R. R. Co. vs. Rock.
125 U. S., 18, 30, N. O. Water Works Co. vs. Louisiana Sugar Refining Co.
142 U. S., 282, M. & M. R. R. Co. vs. Todd County.
121 " 388, Lehigh Water Co. vs. Easton.
99 " 309, 320, University vs. People.
10 Wall., 511, R. R. Co. vs. McClure.
14 Wall., 661, Delmas vs. Insurance Co.
14 Wall., 23, Kennebec Railroad Co. vs. Portland R. R.
14 Howard, 149, Lawler vs. Walker.
12 Wall., 384, Northern Railroad vs. People.
5 Howard, 317, Commercial Bank vs. Buckingham.
14 Pet., 49, Mitchell vs. Lenox.

Morley v Lake Shore & Mich Southern R R Co. decided U.S. 14 1892 Syl. 1. 2. + 8.

REFERENCES TO THE RECORD

In Support of the Motion to Dismiss for Want of Jurisdiction.

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The First Foundation of Judgment:—Both parties claiming under S. H. G. Pennybacker in fee, are held to admit her title in fee, and her senior grant held void.

Grant, S. H. G. Pennybacker to J. B. Laidley, Jan. 26, 1882,	208
Grant, S. H. G. Pennybacker and husband to C. P. Huntington, Feb. 25, 1870 - -	209-210
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Second Foundation for the Judgment:—Estoppel by Record.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

CENTRAL LAND COMPANY OF WEST VIRGINIA, PLAINTIFF IN ERROR,

vs.

JOHN B. LAIDLEY.

ON MOTION TO DISMISS.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

In this action of ejectment instituted in the circuit court of Cabell county, State of West Virginia, the plaintiff John B. Laidley claimed title to the land in controversy by grant in fee to him from

S. H. G. Pennybacker, dated January 26, 1882; the defendant in the action, the Central Land Co., of West Virginia, claimed title in fee by a senior grant from S. H. G. Pennybacker and her husband to C. P. Huntington, dated February 25, 1870, and by grant in fee from C. P. Huntington to said defendant, dated October 16, 1871. The plaintiff and the defendant claiming title in fee from Mrs. S. H. G. Pennybacker, a married woman at the time of the grant to C. P. Huntington, but a widow at the time of the Junior grant to J. B. Laidley, were held to have admitted such title in her; that is both were estopped to deny that she had such title as they claimed. On a comparison of titles, the Supreme Court of the State, on the 26th of November, 1887, on a former writ of error, declared the senior grant to C. P. Huntington null and void, on account of the defective acknowledgment of her deed to C. P. Huntington; she being a married woman at the time of its execution and a new trial having been awarded, at the subsequent trial the circuit court instructed the jury in accordance with the opinion of the Supreme court as to the validity of the senior grant and a verdict was returned and judgment rendered on the 12th day of Sept. 1890, in favor of the plaintiff, Laidley, to which judgment the Supreme court of West Virginia, on the 14th day of November, 1890, refused to grant a writ of error, and on the 7th day of July the Chief Justice of the United States awarded a writ

of error to the said order of the State Supreme court on the petition of the Central Land Company of West Virginia.

On motion to dismiss the said writ of error, the defendant in the writ of error, John B. Laidley, respectfully asks the attention of the court to the facts upon which said verdict and judgment were rendered. Beside the case already stated in which the sole question was the validity of the senior grant to Huntington, the plaintiff in the action made out at the trial before the jury the following distinct case:

Pending this action of ejectment, the Central Land Compahy of West Virginia filed its bill in equity in the circuit court of Cabell county against John B. Laidley asserting title under said senior grant to Huntington, and praying that the junior grant to John B. Laidley by S. H. G. Pennybacker might be cancelled, and that this action of ejectment might be perpetually enjoined. The circuit court of Summers county at Hinton, to which court the case had been removed for trial, on the 14th day of May, 1888, rendered a decree in the said suit in equity upon the bill, demurrer, the amended bill and demurrer, the answers and replications and depositions, in favor of the defendant Laidley against the plaintiff, the Central Land Company, dismissing its bill with costs. On the petition of the Central Land Company the Supreme court of

the State allowed an appeal from said decree on the 20th day of June, 1888; and while said appeal was pending, to-wit, on the 5th day of September, 1888, this action of ejectment was called for trial in the circuit court of Summers county at Hinton, to which court it had been removed for trial; thereupon the Central Land Company, the defendant in the action, moved the said circuit court under chapter 136, Sec. 6, of the code of West Virginia for a stay of the proceedings in the action of ejectment until the decision of the Supreme court of Appeals of West Virginia, upon said Appeal.

The following is the statute referred to:

Sec. 6. Whenever it shall be made to appear to the Circuit court, or to the Judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another county, such court or Judge shall make an order staying the proceedings therein upon such terms as may be prescribed in the order.

West Va. Code, chapter 136, sec. 6, (Warth's edition, 1887.)

And the said circuit court, on the 5th day of September, 1888, granted the said stay "upon the terms and conditions that the Central Land Company of West Virginia agrees in open court that judgment be at once entered for the plaintiff in said action of ejectment for the estate in fee simple in the lands described in the declaration, without further defence, in the event the degree afore-

said in said chancery suit be affirmed upon said appeal, so far as it relates to the title to the land. Thereupon the said defendants accepted said stay of proceedings upon the terms aforesaid," and the said action of ejectment was accordingly stayed until said Supreme Court finally determined said appeal on the 11th day of February, 1889, sustaining the said decree of the Circuit Court of Summers county.

The record of the Hinton agreement entered in the action of ejectment, and the record in the said Chancery suit, and the final decree therein of the Supreme Court of Appeals of West Virginia, were relied upon in evidence before the jury at the trial in September, 1890, and made out a complete case against the Central Land Company without reference to the validity or invalidity of the said senior grant to C. P. Huntington; and was sufficient itself to sustain said verdict and judgment regardless of the defect in said senior grant.

By virtue of the said Hinton agreement, the said final decision of the chancery case in favor of Laidley became conclusive of the ejectment suit upon the question of title. By that agreement of record it became and was made a conclusive estoppel by record against the Central Land Company of West Va., to again assert the same title in the action of ejectment. Such would have been the natural legal effect of the final decision on appeal in the chancery suit; the parties being the same and

the issue identical "quo ad" the validity of the senior grant; but this natural legal effect was clinched by the Hinton agreement. However erroneous the said chancery decree may have been, it was made conclusive of the action of ejectment by the Hinton agreement. And this it is submitted is an independent ground upon which the judgment can be sustained, not involving any federal question.

At the final trial of this action of ejectment in September, 1890, the circuit court of Cabell county refused to grant an instruction asked for by the Central Land Company, which it claims presents a question reviewable by the Supreme court of the United States.

The following is the instruction:

DEFENDANT'S INSTRUCTION NO. 1.

"If the jury find from the evidence that C. P. Huntington purchased, paid for and took possession of the tract of 240 acres in controversy on the 25th day of Feb., 1870, or any time thereafter by virtue of and under claim of the deed of Jno. M. Pennybacker and S. H. G. Pennybacker, dated Feby. 25th 1870; and that C. P. Huntington after that time and before the institution of this action, conveyed by deed said tract to the defendant the Central Land Company of West Virginia, who took possession of said tract, and has held possession thereof ever since; then the court instructs that by sec. 8 of Art. II of the Constitution of the State of West Virginia adopted by the people thereof in the year 1863, and by sec. 4 of chapter 73 of the code of West Virginia of 1868, which sec. 4 was taken from the code of Virginia of 1860 and was in force in the territory included in the State of West Virginia at the time

of the adoption of the said Constitution, and had received a construction or a settled interpretation before the formation of the State of West Virginia, in the cases of Hairstone vs. Randolph, 12 Leigh, 445; Siter, Price & Co. vs. McClanachan, 2 Grattan, 280, and Grove vs. Zumbro, 14 Grat., 514, and that under the interpretation given to said section 4 by the Supreme court of Appeals in the three decisions aforesaid, the said deed of John M. Pennybacker and S. H. G. Pennybacker dated Feb. 25, 1870, with the acknowledgment and certificate of recordation attached, was sufficient to pass to C. P. Huntington at the time of its execution all right, title and interest of every kind whatsoever, of the said John M. Pennybacker and S. H. G. Pennybacker to said tract of 240 acres, you should find a verdict in the case for the defendant.

There are two grounds for the refusal of the court to grant this instruction. The court did not state the reasons for its action. The instruction therefore stands or falls upon its own merit.

Evidently one ground for the court's action is that the instruction was technically defective, the other ground is that it does not state the law of the case correctly. It is erroneous in principle.

The instruction is informal; it wholly ignores one half of the evidence given to the jury by the plaintiff in the action under the direction of the court. In effect the instruction tells the jury that the senior grant to C. P. Huntington by S. H. G. Pennybacker, was a valid deed, notwithstanding it had been declared void by the Supreme court in this action on the former writ of error; and it tells the jury that they must find for the defendant in

the action, the Central Land Company, if they find that the said defendant is in possession of the land claiming title by deed from C. P. Huntington and under said senior grant by S. H. G. Pennybacker to said Huntington.

It is evident that said instruction excludes from the consideration of the jury and utterly ignores the evidence given to them under the direction of the court of the Hinton agreement, which was acted on by the court and parties, dated May 5th, 1888, to the effect that the ejectment suit should abide the event of the chancery suit referred to in the agreement; and it ignores the record and final decree on appeal in said chancery suit made on the 11th day of Feb. 1889, by the Supreme court of Appeals of West Virginia.

The effect of the evidence so excluded was to establish title in the plaintiff by estoppel by record, regardless of the validity of the senior grant referred to in the instruction. And upon this ground it must be taken that the court acted in refusing to give the instruction, even if it be admitted that a federal question were involved in declaring the Pennybacker deed void; because it does not affirmatively appear that the court acted upon such alleged federal question, and such decision of the said federal question not being necessarily involved in the action of the court. The plaintiff Laidley, had a right to the benefit of the evidence of the Hinton agreement, and final decree on appeal

in the chancery case, whatever weight by way of estoppel the same might have had, and whether the senior grant to Huntington was void or valid.

We insist therefore upon this point.

The principle is well established that where there are two distinct grounds upon which the judgment of the state court can be sustained; one of which does involve a federal question, and one does not, the Supreme court of the United States has no jurisdiction under the Constitution and laws of the United States to review the judgment.

But the instruction is erronous in principle; it is an attempt to assert a pretended right under Art. I, Sec. 10 of the Constitution of the United States.

The plaintiff in error claims, that the decision of the Supreme court of West Virginia rendered on the 26th day of November, 1887, on writ of error in this action, and the final judgment of the circuit court of Cabell county, rendered on the 12th day of Sept., 1890, was in conflict with the three Virginia decisions named in the instruction; that the Virginia decisions had placed a construction upon thd statute involved which had become a part of the contract between S. H. G. Pennybacker and C. P. Huntington and that a subsequent decison could not be rendered by a state court construeing the same statute so as to avoid such contract under the above mentioned clause of the United States Constitution.

The defendant in error denies the conclusion reached by the Land Company even if the premises be correct.

Even if the senior grant by S. H. G. Pennybacker to C. P. Huntinton, dated Feb. 25, 1870, were a valid deed according to the construction of the statutes given by the three decisions referred to in the instruction, and if the final judgment in this action has the effect to violate the obligation of such contract by the refusal of the court to give effect to such valid contract, yet Art. I, Sec. 10 of the constitution of the United States does not limit the jurisdiction of the State court in such case and the 25th section of the judiciary Act does not confer upon the Supreme court of the United States jurisdiction to review such judgment of the circuit court.

In its application for a writ of error presented to the Chief Justice the Central Land Company alleges that—

"The purchase of the said land of the Pennybackers [by C. P. Huntington] and the said deed conveying the same to him became an executed contract, which no action of the Judiciary of the State of West Virginia, had any right, authority or power to impair or invalidate by changing the settled construction of the said section 4, of Chapter 73 of the Code of West Virginia of 1868."

The proposition assumes that the deed or senior grant C. P. Huntington was a valid deed, and that the decision of the state court declaring it void

was in conflict with the prior Virginia decisions and a vital change of a rule of property.

It also assumes that the clause of the Coustitution of the United States referred to in the instruction, prohibits a state court from construing a contract, so as to declare it void because not in conformity with a state statute.

But neither of these assumptions are tenable.

Whether the senior grant to C. P. Huntington were valid or void is a question not arising upon this motion, but only upon a discussion or inquiry into the merits of the case.

Whether the decision of November 26, 1887, of the Supreme court of Appeals of West Virginia on writ of error in this case, is in conflict with the Virginia decisions referred to in the instruction, is also not a question necessarily arising upon this motion; for the reason that if it be true, still the Supreme court of the United States has no jurisdiction to review the judgment of the state court.

Art, I. sec. 10. of the Constitution of the United state prescribes no limitation upon the jurisdiction of the state judiciary; it applied in terms and exclusively to the law making power of a state. "No state shall, without the consent of congress, *** pass any bill of attainder, EX POST FACTO law, or law impairing the obligation of contracts."

The three clauses of the 10 sec. refer to the constitutional or law making power of the state, and not to the State Judiciary.

The decision complained of in this case therefore does not deny to the Central Land Company any right under the Constitution of the United States.

The 25th section of the Judiciary Act, clause 2nd, provides in substance that where there is drawn in question the validity of the statute of a state upon the ground that it is in conflict with the Constitution of the United States, and the decision is against its validity, the Supreme Court of the United States may review such decision of the state court on writ of error.

The 3d clause of the act provides that where a right, title, &c., is claimed under the Constitution of the United States and denied by a state court, the action of the State Court may be reviewed on writ of error by the Supreme Court of the United States.

But no statute has been passed in the state of West Virginia affecting the deed in controversy since the execution of the deed, and the Constitution of the United States does not limit the general jurisdiction of the state courts in construing contracts and state statutes so as to prohibit the state court from declaring a contract to be void or valid as the law of the case may require.

The constitution of the United States protects contracts against the legislative power of a state, but does not attempt to regulate the consience or acumen of state Judges.

The allegation of the petition for the writ of error to the effect that the decision of the state court violates the obligation of a contract, does not set up a right under the Constitution of the United States; it must be a state statute that violates the contract, and a state decision in favor of its validity before the constitutional right is denied by a state court.

The instruction No. 5, given by the circuit court Cabell county at the final trial in September, 1890, to the effect that the senior grant by S. H. G. Pennybacker to C. P. Huntington was null and void, presents a question not arising on this motion to dismiss for want of jurisdiction, but only on a review of the merits of the case.

The points relied upon to sustain the motion to dismiss for want of jurisdiction may be re-stated as follows:

1. If there be two grounds upon which the state judgment can be sustained, one of which involved a federal question and one does not, the United States Supreme court has no jurisdiction to review the judgment.

2. Defendant's instruction No. 1, was refused by the Circuit Court upon technical grounds; at least it does not affirmatively appear that a right claimed under the constitution of the United States

was necessarily acted upon and denied by the court in its refusal to give the instruction; and the denial of such right was not necessarily involved in the refusal to give the instruction.

3. The decision complained of involved only the construction of the State statute, and not any constitutional right whatever.

4. Where a state court declares a contract void, the United States Supreme Court has no jurisdiction under Art. I, Sec. 10 of the constitution of the United States, and the 25 section of the judiciary Act, to review such judgment, on the groun d that the decision violates the obligation of contracts Before such jurisdiction can attach, it must appear that the decision of the state court sustains a state statute or other exercise of legislative power which has the effect to violate the obligation of a contract.

5. The question whether the contract in controversy was in fact void or valid, is not open to discussion on a motion to dismiss; such question can only arise upon the merits of the case, after the adjudication upon the foregoing points.

6. The principle governing the case of Gilpecke vs. Dubuque, 1 Wallace, and similar cases, applies only to suits brought in the United States Circuit

and District courts, when such courts have original federal jurisdiction; and has no application to the review of a decision of a state court under the 25th section of the Judiciary Act.

Respectfully submitted,

JOHN B. LAIDLEY.

HUNTINGTON, W. VA., Nov. 8th, 1892.

1281

JAN 20 1902
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND COMPANY, OF WEST VIRGINIA,

vs.

JOHN B. LAIDLEY.

On Motion to Dismiss and Affirm.

D. T. Brown,
for Laidley

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND COMPANY, OF WEST VIRGINIA,
Defendant below and Plaintiff in error,

vs.

JOHN B. LAIDLEY. *Plaintiff below and Defendant in error.*

MOTIONS TO DISMISS AND AFFIRM.

To the Hon. Judges of the Supreme Court of the United States:

Now comes the defendant in error, John B. Laidley, by his attorney, James F. Brown; and respectfully moves this honorable Court, to dismiss the writ of error, allowed in this case, to the judgment of the Supreme Court of Appeals of West Virginia, rendered on the 14th day of November, 1890; for the reason that the record does not set out, or disclose, any matter, or thing, of which this honorable court has jurisdiction, under the constitution, and laws, of the United States.

And the said defendant in error further moves this honorable Court, that if it shall be of opinion, that it has jurisdiction to review the said judgment of the Supreme Court of Appeals of West Virginia; then that this Court will affirm the said judg-

ment of the Supreme Court of Appeals of West Virginia, because the question, on which such jurisdiction depends, "is so frivolous as not to need further argument."

Respectfully submitted,

J. F. BROWN, *Att'y.*

To the Central Land Company of West Virginia:

Take notice, that on the 8th day of February, 1892, I shall submit the motions above set out to the Supreme Court of the United States, at Washington, D. C.; and ask the said Court to pass upon the same.

Respectfully,

JOHN B. LAIDLEY,
By J. F. BROWN, *Att'y.*

January 12th, 1892.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND COMPANY, *of West Virginia*,

vs.

JOHN B. LAIDLEY.

On Motion to Dismiss and Affirm.

STATEMENT OF THE CASE.

In 1882, John B. Laidley brought an action of ejectment in the Circuit Court of Cabell county, West Virginia, against the Central Land Company, of West Virginia, to recover a tract of land containing about 240 acres in the city of Huntington. (Record page 2.) Both plaintiff and defendant claimed title to the land from Mrs. S. H. G. Pennybacker; who was the admitted owner of the land on the 25th day of February, 1870, and at that time a *married woman*. On said last named day Mrs. Pennybacker and her husband signed a deed purporting to convey the land to C. P. Huntington. (Record page 25.) On the 16th day of October, 1871, Huntington conveyed his title to the Central Land Company. (Record page 28.)

Laidley claimed title to the land under a deed from Mrs. Pennybacker, dated the 26th day of January, 1882, (Record page 24,) executed after the death of her husband, which occurred in 1881.

Laidley relied for a recovery upon the fact that the deed from Mrs. Pennybacker to Huntington only conveyed the freehold estate of her husband during their joint lives, and was void as to her, because of defects in the certificate of acknowledgment.

On the trial of this cause in the Circuit Court, in December 1884, the plaintiff prayed the following instruction to the jury:

"The court instructs the jury that the deed executed by J. M. Pennybacker to C. P. Huntington, bearing date the 25th day of February, 1870, offered in evidence by the plaintiff and purporting to be also signed by S. H. G. Pennybacker, and purporting to be also acknowledged by Sarah H. G. Pennybacker, is a good deed for the purpose of conveying the interest of John M. Pennybacker in the lands therein mentioned, and the court also instructs the jury that if they find from the evidence, that the said Sarah H. G. Pennybacker at the time of the execution and acknowledgment of the said deed was the wife of the said John M. Pennybacker, then the said deed is not valid so far as it purports to be her deed, and does not convey any interest she may have had in said land; and cannot operate against her or her grantees by way of estoppel." (Record page 75.)

The trial court refused this instruction; to which action the plaintiff excepted, and the case being submitted to the jury, a verdict was found for the defendant, on which the court entered judgment (Record page 14.) Laidley thereupon took the case to the Supreme Court of Appeals of West Virginia. In his petition for the writ of error, the first error assigned was the following:

"The court erred in refusing to give the instruction asked for by the plaintiff, stating the legal effect of the deed from John M. Pennybacker to C. P. Huuntington, dated 25th day of February, 1870." (Record page 1.)

On the hearing of this appeal, the Supreme Court of West Virginia, on the 26th day of November, 1887, held that the certificate of acknowledgment to the said deed from Mrs. Pennybacker to Huntington, was fatally defective; that Mrs. Pennybacker's title in fee, did not pass under that deed, and that Laidley was entitled to the instruction above set out. (Record page 196; Laidley *v.* Central Land Co., 30 West Va. Rep. 505.)

This was a decision of the court of last resort in the State of West Virginia, that Mrs. Pennybacker's deed to Huntington did not pass the fee. On the hearing of this appeal no federal question was ever raised, or suggested, to the Supreme Court of West Va. as involved in the decision. And no attempt has ever been made to review this decision of said Supreme Court, either by petition for rehearing, or by writ of error from the Supreme Court of the United States. The decision became final and binding at the end of the term at which it was pronounced.

While Laidley's appeal from the first trial in the ejectment suit, was pending in the Supreme Court of West Virginia as above set out, and as yet undecided; the Central Land Company, in June, 1887, filed a bill in equity against Laidley, for the purpose of can-

celling his deed from Mrs. Pennybacker, as a cloud upon its title, or in case the certificate of acknowledgment to Mrs. Pennybacker's deed to Huntington should be held bad, that then Laidley might be decreed to hold the legal title to the land *in trust* for the Central Land Co., and compelled to convey the same to it. (Record, page 80.)

Upon the decision of the Supreme Court of West Virginia above stated, the land company, in March, 1888, filed an amended and supplemental bill, for the purpose of having Laidley declared a *trustee* of the legal title, for its benefit. (Record page 91). This last bill contained the following allegations:

"And this plaintiff further complaining avers and says, that since the filing of the original bill herein, the appeal, writ of error and supersedeas from and to the judgment of the circuit court of Cabell county, obtained by said Laidley to and from the Supreme Court of Appeals of this State, referred to in its original bill herein, and the said printed record Exhibit "A," therewith filed, has been heard and determined by the said court; and the said court has reversed the judgment of the court below in favor of the validity and sufficiency of the said acknowledgment of the said S. H. G. Pennybacker of said deed; and *has decided that said certificate is defective in law, and consequently that the said deed did not convey her title to said land to Mr. Huntington*, and therefore the said cause was remanded for a new trial; and the same, with other actions of ejectment against its said vendees, brought by said Laidley, are now pending in this court on the law side thereof; and the plaintiff is now advised and believes and so charges, that under and by virtue of this decision of said Supreme Court of Appeals *the legal title to the said real estate in controversy in this suit, no matter how it may have been wrongfully and fraudulently obtained, is in the defendant Laidley etc.*" (*Record page* 97).

This chancery suit, as well as the ejectment suit having been removed to the Circuit Court of Summers county, that Court on the 14th day of May, 1888, dismissed the plaintiff's original and amended and supplemental bills. (Record page 198.) From this decree the Land Company took an appeal to the Supreme Court of West Virginia (Record page 79), upon the hearing of which, the decree of the court below, dismissing said bills, was affirmed, on the 11th day of February, 1889. (Record page 228; Central Land Company *vs.* Laidley, 32 West Va. Rep. page 184.

While the said appeal of the Central Land Company was pending in the Supreme Court, the Land Company asked the Circuit Court for a stay of proceedings in the ejectment suit, and thereupon the following order was entered under the following provision of the Code of West Virginia:

"§ 6 Whenever it shall be made to appear to the circuit court or to the judge thereof in vacation, that a stay of proceedings in a

case therein pending, should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein *upon such terms* as may be prescribed in the order." Code W. Va. ch. 136 § 6.

J. B. Laidley, plaintiff,
vs.
The Central Land Company of W. Va., defendant. } In Ejectment.

and

J. B. Laidley, plaintiff,
vs.
The Central Land Company of W. Va., defendant. } In Ejectment consolidated.

This day came the plaintiff by his attorneys, and the defendant by its attorneys; and thereupon the defendant moved the court for a stay of proceedings in these causes until the decision of the Supreme Court on the appeal hereinafter mentioned; upon the ground that there is pending in the Supreme Court of Appeals of this State, an appeal by the defendant from a decree in this court, in the chancery cause of the Central Land Company of West Virginia against J. B. Laidley and others; and read in evidence in support of said motion, the record of said chancery suit and of the appeal thereon; and the plaintiff resisted said motion, and insisted upon a trial of said action of ejectment; and the court having fully considered the matters arising upon said motion, doth decide to stay said action until the decision of the Appellate court in said chancery cause, upon condition and not otherwise, that said defendant, The Central Land Company of West Virginia, agrees here in open court that judgment be at once entered for the plaintiff in said action of ejectment, for the estate in fee simple in the lands in the declaration in said action described, without further defense, in event the decree aforesaid in said chancery suit be affirmed upon said appeal, so far as it relates to the title in the land, but judgment so to be entered to be without prejudice to the right of the defendant, if any it has, to compensation for any improvements it may have placed upon the lands in controversy; *and thereupon the said defendant in open court accepted said stay of proceedings upon the terms aforesaid.*" (Record page 199.)

On the 6th day of May, 1889, the ejectment suit was remanded from the Circuit Court of Summers county, to the Circuit Court of Cabell county, on motion of the Land Company. (Record page 199.)

At the May term, 1890, of the Circuit Court of Cabell County, the ejectment suit was again tried; and ended in a hung jury. (Record page 203.) At the September term, 1890, to-wit, on the 12th day of September, 1890, of said court, another trial of the ejectment suit was had, and a verdict rendered in favor of the plaintiff, John B. Laidley; on which verdict the court entered judgment. (Record pages 204, 206.) To this judgment, the Supreme

Court of West Virginia on the 14th day of November, 1890, refused to grant a writ of error and supersedeas, on the ground that the judgment was plainly right. (Record page 196.)

It is to this last judgment of the Supreme Court of Appeals of West Virginia, rendered on the 14th day of November, 1890, *nearly three years after its first decision holding the certificate on the deed from Mrs. Pennybacker to Huntington to be bad*, that the Central Land Company has sued out the present writ of error from the Supreme Court of the United States. (Record pages 259 *et seq.*)

What is the federal question involved in this case in which the Central Land Company relies to maintain the jurisdiction of the Court?

It is upon the theory; that at the date of the deed from Mrs. Pennybacker to Huntington, the certificate of the privy examination and acknowledgment was good under the decision of the Court of Appeals of Virginia rendered before the formation of West Virginia; and that the principles of these decisions had not been changed by the Legislature of West Virginia, or any decision of the court, before the deed from Mrs. Pennybacker to Huntington, and that thereby Huntington obtained a vested right to the land, which would be protected under the constitution of the United States, (Record page 260,) and therefore the Circuit Court of Cabell county, upon the last trial of the ejectment suit, erred, in giving plaintiff's instruction No. 5, and in refusing defendant's instruction No. 1. These instructions are hereinafter set out in full.

At the last trial of the action of ejectment in September, 1890, in Cabell county, the plaintiff, Laidley, gave in evidence to the jury, the record of said suit in Chancery, the final judgment thereon by the Supreme Court of Appeals in his favor, and the above agreement of record, of the Land Company, that judgment should go in his favor if the appeal in the chancery suit should be decided adversely to the Land Company; (Printed record pages 226, 227, 80, 76.) and insisted that these matters were conclusive as an estoppel against the Land Company, and entitled him, Laidley, to a judgment, without reference to the paper titles and without reference to the validity or invalidity of the Huntington deed, to which alone the two instructions above mentioned relate.

THE INSTRUCTIONS.

The two written instructions above referred to and set out in the Land Company's application for this writ of error, are as follows:

PLAINTIFF'S INSTRUCTION NUMBER 5.

"The court instructs the jury, that if they believe from the evidence, that at the time of the execution of the deed of February 25th, 1870, by J. M. Pennybacker and wife, to C. P. Huntington, Sarah H. G. Pennybacker was a married women, then said deed to Huntington is absolutely void as to her, and passed no title legal or equitable to said Huntington; and that Mrs. Sarah H. G. Pennybacker was as fully vested with the title to the land there-

in mentioned, after said deed was made as before, and had full power thereafter by deed to convey the same to whom she pleased, and vest in such purchaser as good title thereto as she had before said deed to Huntington; and the court further instructs the jury that by the deed from Mrs. Sarah H. G. Pennybacker to John B. Laidley of January 26th, 1882, he acquired and became vested with all the title and interest in the lands that Mrs. S. H. G. Pennybacker had." (Printed record, page 255.)

DEFENDANT'S INSTRUCTION NUMBER 1.

"If the jury finds from the evidence that C. P. Huntington, purchased, paid for, and took possession of the tract of 240 acres in controversy on the 25th day of February, 1870, or any time thereafter by virtue of and under claim of the deed of John M. Pennybacker and S. H. G. Pennybacker, dated Feb'y 25th, 1870, and that the said C. P. Huntington after that time and before the institution of this action, conveyed by deed said tract to defendant, The Central Land Company of West Virginia, who took possession of said tract, and has held possession thereof ever since then, the court instructs that by section 8 of Article 11 of the Constitution of the State of West Virginia, adoped by the people thereof in the year 1863, and by section 4 of chapter 73 of the Code of West Virginia of 1868, which section 4 was taken from the Code of Virginia of 1860, and was in force in the territory included in the State of West Virginia, at the time of the adoption of the said constitution, and had received a construction or settled interpretation before the formation of the State of West Virginia in the cases of Hairstone *vs.* Randolph, 12th Leigh 445, Siter, Price & Co, *vs.* McClanachan, 2 Grattan 280, and Grove *vs.* Zumbro 14, Grattan 514, and that under the interpretation given to said section 4 by the Supreme Court of Appeals in the three decisions aforesaid, the said deed of John M. Pennybacker and S. H. G. Pennybacker, dated Feb'y 25th, 1870, with the acknowledgment and the certificate of recordation attached, was sufficient to pass to C. P. Huntington at the time of its execution all the right, title and interest of every kind whatsoever of the said John M. Pennybacker and S. H. G. Pennybacker to said tract of 240 acres, you should find a verdict in the case for the defendant.

(Printed record 256.)

On the motion to dismiss this Writ of Error, the defendant in error assigns the following grounds:

1. The judgment can be sustained on two distinct grounds, one of which does not involve a federal question.

The agreement of record in the action of ejectment, dated Summers county, September 5th, 1888, and the final conclusion of the chancery cause, referred to in that order, in favor of Laidley, are sufficient as an estoppel, to sustain the judgment in ejectment of September 12th, 1890, without reference to the validity or invalidity of the Huntington title, to which the instructions relate.

2. The plaintiff's instruction number (5) (Five) does not involve any question of federal jurisdiction.

Because it does not affirmatively appear from the record that a title, right, privilege or immunity under the constitution of the United States, *was specially set up or claimed*, and adversely decided by the court, by that instruction, against the claimant, within the provisions of the third clause of the second section of the Act of February 5th, 1867. Nor is there drawn in question the validity of any treaty, or State statute, as provided in the first and second clauses of the same section. The mere fact that the State court holds a deed void, which thiscourt might have held valid, does not raise any federal question.

3. Defendant's instruction, number one, without regard to any question of federal jurisdiction, was properly refused:

Because bad in form and substance, in that it left to the jury to construe the law of the Virginia cases named in the instruction, and excluded from the consideration of the jury all the evidence in the case, except that in favor of the defendant, and especially did it exclude from the jury all consideration of the agreement of record dated September 5th, 1888, and which had been given in evidence to the jury (record page 227.) Therefore if this instruction had specially set up or claimed any right or privilege under the constitution of the United States, it was rightly refused without passing upon such right or privilege. But this instruction does not specially set up, or claim, or call the court's attention to any such right or privilege.

4. Because if there ever was a federal question involved in the validity of Mrs. Pennybacker's deed to Huntington, the time and place to have specially set up and claimed it, was in the Supreme Court of Appeals of West Virginia, on the first appeal by Laidley in 1886, when the question of the validity of that deed was directly presented to the Supreme Court of the State.

The defendant in error now submits the following propositions of law.

First. When the judgment of a State Court can be sustained on two distinct grounds, one of which involves a federal question and one does not, the Supreme Court of the United States has no jurisdiction to review the judgment.

134 U. S. 607, Blount vs. Walker.
135 U. S. 244, Beatty *vs.* Benton.
133 U. S. 65, San Francisco *vs.* Itsell.
" " 380, Hopkins *vs.* McClure.
132 U. S. 554, Hale *vs.* Akers.
129 U. S. 178, Warien *vs.* Brinkley.
127 U. S. 216. DeSaussure *vs.* Jaillard.
127 U. S. 123, Adams Co. *vs.* B. & M. Co.
108 U. S. 105, Crosby *vs.* New Orleans.

111 U. S. 361 Santacruz *vs.* Santacruz.
91 U. S. 578, McManus *vs.* O'Sullivan.
81 U. S. 231, Kennebec *vs.* Portland.
20 Wallace 590, Murdock *vs.* Memphis.
125 U. S. 18, Water Works Co. *vs.* Louisiana Sugar Refinery Co.

Second. The meaning and intent of the State statute, and not its *validity* or constitutionalty, is the sole question involved in plaintiff's instruction number five (5.) If it appears that the decision of the State Court turned upon the *construction* and not the validity of the state statute, this court has no jurisdiction.

5 Howard 317, Commercial Bank *vs.* Buckingham.
12 Howard 165, Railroad Company *vs.* Marshall.
6 Peters 291, Green *vs.* Neal.
11 Peters 167, McBride *vs.* Hoey.
10 Wheaton 152, Elmendorf *vs.* Taylor.
12 Wallace 379, Knox *vs.* Exchange Bank.
8 Wallace 44, Furman *vs.* Nichol.
4 Wallace 181, R. R. Co. *vs.* Rock.
10 Wallace 511, R. R. Co. *vs.* McClure.
107 U. S. 33, Burgess *vs.* Selligman.
10 Peters 308, Crowell *vs.* Randolph.

Third. It must affirmatively appear from the record not only that the right under the constitution *was specially set up or claimed*, but also that it was *acted upon* by the State Court, and decided adversely to the claimant, or the jurisdiction does not exist.

It cannot be said that by giving instruction number 5 for *Laidley*, the court acted *on a right specially set up and claimed by the plaintiff* in error, under the constitution of the United States.

138 U. S. 635, Cook county *vs.* Calumet & Chicago Canal Co.
137 U. S 48, Texas Pacific Co. *vs.* Southern Pacific Co.
128 U. S. 132, Chappel *vs.* Bradshaw.
127 U. S. 216, DeSausure *vs.* Gaillard.
124 U. S. 391, Brooks *vs.* Mo.
114 U. S. 133, Detroit *vs.* Guthard.
110 U. S. 57 Susquehanna *vs.* Boom Company.
116 U. S. 54, Simmerman *vs.* Nebraska.
111 U. S. 200, Chouteau *vs.* Gibson.
106 U. S. 97, Brown *vs.* Colorado.
71 U. S. Mississippi *vs.* Rock.
73 U. S. 258.

Fourth. A right under the constitution of the United States was not specially set up or claimed in defendant's instruction number one (1.) And if so, it does not affirmatively appear from the record that the Court acted on that question and decided the same against the plaintiff in error; but the court, for aught that appears, refused the instruction on entirely different and distinct grounds, which have been already pointed out.

The authorities cited above apply to the latter part of the above proposition.

The court may have been influenced by the pretended federal question in refusing the instruction; but not necessarily so. The instruction was erroneous and properly rejected, regardless of the merits of the question it proposed; but the well established principle already quoted, requires that the record must show affirmatively that the State Court denied to the plaintiff in error the right specially set up or claimed under the constitution.

Fifth: The mere fact that the State Court held the deed to be void, when this court, if the case had been before it, might have held the same deed good, presents no federal question.

Knox *v.* Exchange Bank, 12 Wall 379.

R. R. Co. *v.* Rock, 4 Wall 177.

There is no merit in the proposition attempted in the defendant's instruction number one (1). The statute to which it refers has always received the same construction in the State of Virginia and in this State as well as in the sister States of the union; that is, being an inovation on the Common Law it is strictly construed, and such construction has become a rule of property.

The decision of the Supreme Court of Appeals of the State of West Virginia in this case on November 26th, 1887, (30 West Virginia Report p. 505), is not in conflict with the three decisions mentioned in the instruction. The Supreme Court governs its construction of the statute by those decisions; it does not reverse, contradict or overrule them, but approves and follows them. It does not adopt a liberal in place of a strict construction; there is no change of front on the part of the judiciary. The case of Grove against Zumbro, 14th Grattan 514 was decided before the execution of the deed to Huntington on the 25th of Feby., 1870, and after the decision of the case of Siter, Price & Co. against McClanachan, 2 Gratt. 219, and if the latter is overruled it is by the case of Grove and Zumbro, decided in 1850 before the date of the deed to Huntington; and not by the decision of the Supreme Court in this case. It can not justly be said that the decision of the Supreme court in this case, is the passage of a law by a State, in violation of the obligation of contract, within the prohibition of the constitution of the United States. It is not sufficient to justify the claim of federal jurisdiction, that the decisionis *strictissimi legis*, or that this court would have been more liberal in its construction of the statute.

The first decision of the Supreme Court of Appeals of West Virginia in this action, was made November 26th, 1887, reported in 30 W Va. 505, by a unanimous court.

A deed precisely similar to the one now involved was construed the same way by the same Court in the case of Blair *vs.* Sayer, in 29 W. Va. Rep. p. — prior to the decision in this case. The same construction of the statute was again unanimously approved by the Supreme Court of Appeals, composed of two new judges,

[redacted]

SU[redacted]

UNITED [redacted]

[redacted]

JOHN [redacted]

THE CENTRAL [redacted]

One week of Service to the Southern [redacted]

[redacted]

Bound at Pio. S. [redacted]

[redacted]

[redacted]

IN THE
SUPREME COURT
OF THE
UNITED STATES.

JOHN B. LAIDLEY, *Defendant in Error,*

vs.

THE CENTRAL LAND COMPANY, *of West Virginia, Plaintiff in Error.*

On writ of Error to the Supreme Court of Appeals of West Virginia.

BRIEF OF JNO. E. KENNA AND W. E. CHILTON,

On Motion to Dismiss and Affirm.

On September 12th, 1890, in the Circuit Court of Cabell County, West Virginia, the defendant in error recovered of the plaintiff in error the tract of land lying in Cabell county, described in the declaration. The plaintiff in error applied to the Supreme Court of Appeals of West Virginia for a writ of error to that judgment, and on November 14th, 1890, the Supreme Court of West Virginia refused the writ of error on the ground that the judgment was plainly right. From this last judgment of the Supreme Court of Appeals of West Virginia, this writ of error is prosecuted.

Section 25 of the Act of February 5th, 1867, gives the Supreme Court of the United States jurisdiction to review a final judgment

of the highest court of a State in which a decision could be had, in only three classes of cases:

1st. Where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decisson is against their validity.

2nd. Where there is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.

3rd. Where any title, right, privilege or immunity is claimed under the Constitution, &c., &c., and the decision is against the title, right, privilege, &c., specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

Jurisdiction is claimed here upon the theory that the decision of the highest court of West Virginia in this case, is in conflict with the Virginia decisions prior to the formation of West Virginia, and that the latter State, having adopted the decisions of Virginia, so far as not in conflict with our organic law, this decision impairs the obligation of a contract, and is therefore repugnant to the Constitution of the United States, and therefore this case is cognizable under the second clause of the Act of 1867 above referred to.

C. P. Huntington conveyed the land sued for to, the plaintiff in error by deed dated October 16th, 1871, with covenants of *special warranty* only. It is but fair to presume that he had taken counsel on the validity of his title and was, therefore, unwilling to warrant generally the title to the Land Company. Huntington derived title by deed from Sarah H. G. Pennybacker, dated February 25th, 1870, she being then a married woman. After the death of her husband, to wit: on January 26, 1882, she conveyed the same land to the defendant in error, John B. Laidley, who soon after brought this action of ejectment in the State Court. Until the agreement of the plaintiff in error to let judgment be entered for Laidley hereinafter referred to, there never was but one question involved in this action of ejectment, to-wit: Was the certificate of acknowledgment to the deed from Mrs. Pennybacker to Huntington of February 25th, 1870, sufficient to pass her title to Huntington by that deed? If it was, the land belonged to the Land Company under its deed from Huntington; if it was not, then Huntington took nothing by his deed from Pennybacker, and the title remained in Mrs. Pennybacker till she conveyed the same to the defendant in error on January 26th, 1882, after her husband's death by a confessedly good deed, and a proper acknowledgment thereof. The trial court in West Virginia held the deed to Huntington to be good. Laidley went to the West Virginia Supreme Court on writ of error, and that court reversed the trial court on the sole ground that the deed to Huntington was not good because the certificate of acknowledgment was fatally defective. That decision was rendered on November 26th, 1887. (See 30 W. Va. Rep., p. 508.) The opinion of the Court was delivered by Judge Snyder, and the opinion itself is the most complete answer to the criticisms of the plaintiff in

error. It is an exhaustive review of all the Virginia and West Virginia decisions on the point, and the cases referred to in instruction No. 1 asked by the plaintiff in error (Hairston *vs.* Randolph, 12 Leigh; Siter, Prince & Co. *vs.* McClanahan, 2 Gratton 280, and Grove *vs.* Zumbro, 14 Gratt. 514), are reviewed and distinguished. But that opinion is based also on the case of Blair *vs.* Sayre, which had been decided by the same Court in April, 1887, and in which exactly the same point was at issue. See 29 W. Va. Rep., 605.

The reasoning of the Court (30 W. Va. page 511,) seems irresistible.

At common law a married woman could not execute a deed, being under disability. Our West Virginia statute, removed the disability provided she execute the deed in a certain way. The statute being in derogation of the common law, the Courts of Virginia, before the formation of West Virginia, and the Courts of the latter State have always held that it must be construed strictly. And this rule of construction is practically universal:

Dodge *vs.* Hallinshed, 6 Minn., 25.
Warren *vs.* Brown, 25 Miss., 66.
Jordan *vs.* Corey, 2 Ind., 385.
Dewey *vs.* Campau, 4 Mich., 565.
Rice *vs.* Peacock, 37 Tex., 392.
Watson *vs.* Michael, 21 W. Va., Rep., 568.
Leftwich *vs.* Neal, 7 W. Va.. Rep., 569.

No one denies that a substantial compliance with the statue will suffice, but it must be a substantial compliance with every requisite of the statue. If one requisite be dispensed with, why not dispense with all? The statute requires a privy examination and that the writing be explained to the wife. After this the wife must (1.) Acknowledge the deed to be her act. (2.) Declare that she had willingly executed it, and (3.) That she does not wish to retract it. There is no escape from the position that in this case, as was held by the West Virginia Supreme Court, the certificate fails to show either the *declaration*, or the *acknowledgement*, and either is fatal.

Fortunately, this same question was before the Supreme Court of Appeals of Virginia in 1890, in Hockman *vs.* McClanahan, 87 Virginia Rep. 33.

There the certificate used the words "declared that she had willingly executed the same." Here the certificate is "acknowledged that she had willingly signed, sealed and delivered, &c." Conceding that the words "signed, sealed and delivered" are the equivalent of "executed," both fail to show that she, *during the privy examination*, "acknowledged the same to be her act." The Virginia Supreme Court reviews the cases relied upon by plaintiff in error, and cites approvingly the cases of Blair *vs.* Sayre and Laidley *vs.* Land Co. from West Va. *supra*.

After reading these exhaustive reviews of the cases in Virginia and West Virginia, it seems incredible that the Supreme Court of West Virginia should be charged with having changed its line of

decisions and changed a rule of property, whereby a construction of the deed of February 25th, 1870, is adopted different from that obtaining at the date of the deed! The West Virginia Supreme Court has not changed front as the State Court did in Gilpecke *vs.* Dubuque, 1 Wall. 175.

In that case the State court confessedly had approved, by repeated decisions, the constitutionality of an Act authorizing the issue of bonds; and relying upon these decisions, investors had purchased the bonds, and after the purchase the State court overruled its former decisions and declared the bonds invalid. This court was, then, in a case involving the same question, and *where this court had jurisdiction on appeal from the judgment of the District Court* of the U. S. for the district of Iowa, asked to follow the new rule of the State court instead of the former rule under which the bonds were purchased; and this Court refused to do so, and maintained the former State decisions. Here the question presented to our Supreme Court was, what was the rule in Virginia before the formation of West Virginia, and in the latter State since? And the court proceeded to ascertain what the rule was, and applied it. The Supreme Court of Virginia as late as 1890, announced and applied the same rule (87 Va. Rep. 33 *supra*). So that the Supreme Courts of both Virginia and West Virginia have not only declared that the rule laid down in this case is correct, but that *such has always been the law of the two States.* Instead of a change of front it is an approval of the settled rule in both States.

It is conceded that the statutes of Virginia on this subject was the same as the statute has always been in West Virginia.

Having thus briefly reviewed the authorities in Virginia and West Virginia on the validity of the certificate of acknowledgement, we come to the enquiry: How does any of this present a question cognizable in this Court under the 25th section of the act of February 5th, 1867?

Is there, in this case, "*drawn in question the validity of a statute*" "*of, or an authority exercised under any State, on the ground of their be-*" "*ing repugnant to the Constitution, treaties or laws of the United States,*" "*and the decision is in favor of their validity?*"

Our statute on the subject of the acknowledgment, is found in section 4, chapter 73, of the Code of West Virginia of 1868, which was enacted on the first day of April, 1869, *one year before the date of the deed from Pennybacker to Huntington*, and this statute has never been changed. In fact, the section was copied literally from the Virginia Code of 1860. The petition for the writ of error exposes the ground upon which this Court is asked to take jurisdiction of this case. In concluding the petition, says: "And the refusal of "the Supreme Court [of West Virginia] to so correct the said er-"ror entitles your petitioner, under the act of Congress in such "cases made and provided, to a writ of error from the Supreme Court "of the United States to the Supreme Court of Appeals of West Vir-"ginia, because there appears in the record of said cause, a Federal "question in this: that the courts of West Virginia, *in construing*

"*the said statute* relating to deeds and acknowledgments thereof, so "as to invalidate the said deed to C. P. Huntington, under which "your petitioner claims, *changed without legislative action* the settled "and established construction which existed at the time of the exe- "cution and delivery of said deed, which is contrary to the Consti- "tution of the United States, and that there is a Federal question "raised by said record in this: the said decision of the Circuit "Court of Cabell County, which undertakes to deprive your petition- "er of his property, is without due process of law, retroactive in its "effect, and unconstitutional." (The italics are my own.) Record 263-4.

Therefore, it is not the *validity* of the statute, but the *construction* thereof, which is complained of. The validity and constitutionality of the statute could not be drawn in question, because it was passed long before the deed of 1870. Lehigh Water Co. *vs.* Easton, 122 U. S.

The position stated in the petition, as quoted at length above, is untenable for three reasons:

1st. Because, as we have already shown, the final judgment of the Circuit Court of Cabell county, affirmed by the Supreme Court of West Virginia, does not change the settled line of decisions of Virginia, but is in conformity with those decisions and in harmony with the decisions of the courts of other states, and follows the previous decisions in West Virginia. And since it has been, in terms, quoted and followed in Virginia. See 87 Va. Rep., 33.

2nd When the ruling of the State court is put upon the ground of pre-existing adjudications, this Court has no jurisdiction to review.

Palmer *vs.* Marston, 14 Wall., 10.
West Tenn. Bank *vs.* Cit. Bank, 13 Wall., 432.

3rd. Because it is the *construction* of the statute and not its validity which is complained of. It is not contended that the 4th section of chapter 73 of the Code of West Virginia is a violation of the constitution of either West Virginia or the United States. Nothing is alleged against the *validity* of the act of the Legislature. And, if it were, the answer would be in the fact that it is in exact language the same as the Code of Virginia of 1860, and has ever since been the law of Virginia and West Virginia. It is the *construction* of the statue of which complaint is made, and on the construction of her own statute, the decisions of the State Courts are final.

Commercial Bank *vs.* Buckingham, 5 How. 317.
Railroad Co. *vs.* Marshall, 12 How. 165.
Green *vs.* Neal, 6 Peters 291.
Knox *vs.* Exchange Bank, 12 Wall. 379.
Furman *vs.* Nichol, 8 Wall. 44.
Burgess *vs.* Seligman, 107 U. S. 33.

4th. Because, admitting for agument's sake, that the decision of our Supreme Court, does change the rule theretofore obtaining, the prohibition against impairing the obligation of a contract as an incident giving this court jurisdiction to review a final decree of the

highest court of a State, is aimed at the Legislative power of the State and not at the decisions of its Courts.

Knox *vs.* Exchange Bank, 12 Wall. 379.

New Orleans Water Works Co. *vs.* La. Sugar Ref. Co. 125 U. S. 18

"This Court is not authorized by the Judiciary Act to review the "judgments of the State Courts because their judgements refuse to give "effect to valid contracts, or because such judgments, in their effects im- "pair the obligation of contracts."

Syl. in Knox *vs.* Exchange Bank, *supra.*

"In order to come within the provision of the Constitution of the "United States, which declares that no State shall pass any law im- "pairing the obligation of a contract, not only must the obligation of a "contract have been impaired, but it must have been impaired by a law "of the State. The prohibition is aimed at the legislative power of the "State and not at the decision of its court, &c."

"This Court, therefore, has no jurisdiction to review the judgment of "the highest court of a State on the ground that the obligation of a con- "tract has been impaired, unless some legislative act of the State has "been upheld by the judgment sought to be reviewed."

Opinion in N. O. Water Co. *vs.* La. S. Ref. Co. *supra.*

The plaintiff in error, to maintain its position, will probably rely upon the following cases:

Ins. Co. *vs.* Debolt, 16 How. 432, where the validity of a State statute was drawn in question, and the State court affirmed.

And,

Havemeyer *vs.* Iowa City, 3 Wall. 294.
Thompson *vs.* Lee, 3 Wall. 327.
Gelpecke *vs.* Dubuque, 1 Wall. 175.
Kenosha *vs.* Lamson, 9 Wall 477.
Chicago *vs.* Seldon, 9 Wall. 50.
Mitchell *vs.* Burlington, 4 Wall. 270.
Alcott *vs.* Fon du Lac Co., 16 Wall. 678.
Anderson *vs.* Santa Anna, 116 U. S. 361.

The last eight coming here on appeal from U. S. Circuit Courts.

These cases uphold the doctrine that "if the contract, when made, "was valid by the laws of the State as then expounded by all de- "partments of the government and administered by its courts of "justice, its validity and obligation can not be impaired by any "subsequent action of legislation, or decision of its courts altering "the construction of the law."

That is the true rule, *where the Federal Court has jurisdiction of the case,* and is called upon to follow the latest decision of a State Court instead of a former one in conflict with the latest decision, and where rights have been acquired under the former decision. And so it was in all of the cases relied upon by the plaintiff in error. The cases came to this Court on appeal from the Circuit Courts of the United States, and this Court simply decided that it would not, in a case properly before it, follow the latest decision of a State Court in conflict with a former decision of the State Court under

which the property involved in the case in this Court had been acquired. And this doctrine was announced as an exception to the rule that the Federal Courts will follow the latest decisions of the highest Court of a State, on all questions of local law; but not as supplying a requisite of jurisdiction to review the judgments of State Courts under the 25th section of the Judiciary Act.

In the case of Mississippi and Missouri R. R. Co. *vs.* Rock, (4 Wall. 177,) which was on writ of error to the Supreme Court of Iowa, the distinction between the rule applied by this Court on appeal from the Circuit Court of the United States, when this Court had jurdisdiction of the case, and the rule applied where the same matter was urged as a ground of jurisdiction to review the judgment of the Supreme Court of a State, is clearly put. In that case, counsel for the plaintiff in error cited the case of Havemeyer *vs.* Iowa Co., (3 Wall. 294) wherein, this Court, on certificate of division in opinion between the judges of the Circuit Court of the United States, for the District of Wisconsin, had upheld the rule laid down in Gilpecke *vs.* Dubuque, *supra*; and counsel insisted upon applying that same rule as the ground of jurisdiction for reviewing the judgment of the State Court. The language of this Court in that case, states my point here;

"The whole case, in the language of the brief, is put upon the "ground that the 'Supreme Court of Iowa has made a decision in "this case which impairs the obligation of contracts;' and the argu- "ment goes upon the fundamental error that this Court can, as an "appellate tribunal, reverse the decision of a state court, because "that court may hold a contract to be void which this Court might "hold to be valid." * * * * "This, obviously, was not the "purpose of the Judiciary act. It must be the constitution, or some "law of the state, which impairs the obligation of the contract, or "which is otherwise in conflict with the Constitution of the United "States; and the decision of the State court must sustain the law "or Constitution of the State in the matter in which the conflict is "supposed to exist, or the case for this Court does not arise."

See, also, Lehigh Water Co. *vs.* Eaton., 122 U. S.

But the record here discloses another state of facts fatal to the jurisdiction of this Court, independent of all the considerations named.

It is well settled that if the State court decided the case on an independeut ground, broad enough to maintain the judgment and not involving a Federal question, even though the State court also decided a Federal question, this Court will dismiss the writ of error without considering the Federal question.

Hale *vs.* Akers, 132 U. S, 554.
Hopkins *vs.* McClure, 133 U. S., 380.
Blount *vs.* Walker, 134 U. S., 607.
Beatty *vs.* Benton, 135 U. S., 244.

While this case was pending in the trial court of the State the plaintiff in error began a suit in equity against Laidley to cancel the deed from Mrs. Pennybacker to him as a cloud upon its title, and

in case the certificate of acknowledgment to the deed from Pennybacker to Huntington should be held invalid, that Laidley might be decreed to hold the legal title to the land *in trust* for the plaintiff in error and be compelled to reconvey the same. The amended and supplemental bill in this suit alleged *that the legal title to this land is in Laidley.* (Record, page 97.)

Thus we had in the same Court, this action of ejectment of Laidley *vs.* The Land Company, wherein Laidley sought to recover the land; and the case of the Land Company *vs.* Laidley, wherein the Land Company sought in equity to take from Laidley the latter's legal title. The trial court below dismissed the bill in the equity suit, and thereupon the Land Company appealed to the Supreme Court of West Virginia. Pending this appeal Laidley pressed for a trial of this ejectment case; and the Land Company asked for a stay of proceedings under the provision of the W. Va. Code, Ch. 136, sec. 6, which is as follows:

"Whenever it shall be made to appear to the Circuit Court, or "to the judge thereof in vacation, that a stay of proceedings in a "case therein pending should be had until the decision of some ac- "tion, suit or proceeding in the same or another Court, such Court "or judge shall make an order staying proceedings therein *upon "such terms as may be prescribed in the order.*"

Thereupon, *upon motion of the Land Co.* the Court granted the stay of proceedings in this ejectment case, "until the decision of the Appellate Court in said chancery cause, *upon condition, and not otherwise,*" that the Land Co. should agree in open court that judgment be at once entered for the plaintiff in said action of ejectment for the estate in fee simple in the lands in the declaration mentioned *without further defense,* in the event that said Appellate Court should affirm the decree dismissing the Land Co.'s bill in the equity case, *and thereupon the defendants (plaintiffs in error here) in open court accepted the stay of proceedings upon the terms aforesaid..*

Record, page 199.

The proceedings in this ejectment case having been thus stayed, nothing was done till the decision of the chancery case by the Supreme Court of West Virginia, which decision was rendered in February, 1889, and is reported in 32 W. Va. Rep. 134.

The Supreme Court of West Virginia fully sustained the court below in dismissing the bill, and thereupon Laidley insisted upon a trial of this ejectment case. At the trial he introduced said order staying the proceedings, and the full record in the equity suit, in order that the court might see that the conditions named in the agreement and order staying the proceedings, had happened, and that he was *entitled to have a judgment entered in this case for the land embraced in his declaration without further defense.*

The order showing that agreement being a record is a verity and can not be questioned here. The agreement was made with the Court, under a statute authorizing the court to exact such terms as he might *name in the order.* The judgment here complained of does nothing but *carry out this solemn agreement.* Now it is respectfully

submitted that this agreement is sufficient of itself to support the judgment complained of and constitutes a distinct and independent ground upon which the action of the court below could have been founded, and therefore excludes the supposed federal question from the consideration of this Court.

It is certainly a sound principle of law that one can not be heard to complain of a judgment which he has solemnly agreed should be rendered. The plaintiff in error is practically asking this Court to review a judgment to which it consented in the court below.

It is fortunate for another reason that the record of the equity suit is in evidence in this case, because it disposes of all the surplusage matter in the petition for writ of error. We do not attempt to explain why all the many-times litigated allegations referring to the transactions between Laidley and Mrs. Pennybacker are inserted in the petition.

But they are, and we refer the Court to the chancery causes where this whole matter is properly cognizable, and where Laidley was completely vindicated, one the chancery suit brought by the Land Co., and the other brought by Mrs. Pennybacker.

Land Co *vs.* Laidley, 32 W. Va. Rep. 134.

Pennybacker *vs.* Laidley, 33 W. Va. Rep, 624.

All questions of equity and morals involved in Laidley's purchase have been determined by the Supreme Court of West Virginia, and none of them can have any effect upon the question of the jurisdiction of this Court to review a judgment of the Court of a State.

For the reasons given it is respectfully submitted that the writ of error should be dismissed.

JNO. E. KENNA,
W. E. CHILTON,
Att'ys for defendant in error.

——IN THE——

SUPREME COURT

——OF THE——

UNITED STATES.

THE CENTRAL LAND COMPANY OF WEST VIRGINIA, Defendant Below, Plaintiff in Error,

AGAINST

JOHN B. LAIDLEY, Plaintiff Below, Defendant in Error.

The Defendant in error makes two motions:

1. To dismiss the writ of error in this cause, and
2. To affirm the judgment complained of.

THE MOTION TO DISMISS.

In support of this motion the defendant in error assigns four several grounds, as follows:

"1. *The judgment can be sustained on two distinct grounds, one of which does not involve a federal question.*"

To sustain this ground he relies upon order made in the case by the Circuit Court of Summers County while the case was pending in that Court. This ground will be discussed further on.

"2. *The plaintiff's instruction number (5) (five) does not involve any question of federal jurisdiction.*"

We don't deem it necessary to discuss the question presented by this ground of objection, in as-much-as a federal question is plainly and distinctly involved in the instruction numter *one* asked for by the defendant and refused by the Court.

"3. Defendant's instruction number one, without regard to any question of federal jurisdiction, was properly refused."

It is not denied here, nor in fact in any of the *grounds* of objection to the jurisdiction of this Court, that a federal question *was* involved in the decision of the case. And it is very certain, we think, that the defendant's first instruction *did*, clearly and explicitly present a federal question for the consideration of the Court, and we submit it was not subject to the objection made to it by the brief-of-counsel. But even if it had been, it was the duty of the Court to strike out the objectionable part of it and give to the jury that part which presented the federal question.

The plaintiff's instruction number 5 is found in the record, pp 255, 256, and the defendant's instruction number one on pp 256, 257 of the record.

"4. Because if there ever was a federal question involved in the validity of Mrs. Pennybacker's deed to Huntington, the time and place to have specially set up and claimed it was in the Supreme Court of Appeals of West Virginia, on the first Appeal by Laidley in 1886, when the question of the validity of that deed was directly presented to the Supreme Court of the State"

The questions arising upon these motions, as we understand them, are: (1) Is there a federal question involved in the decision of this case? (2) If this question be answered in the affirmative, does it sufficiently appear by the record that another question was also involved upon which the judgment of the Court below was, or could have been properly affirmed, regardless of the federal question? and (3) Was this federal question sufficiently and in due time set up as a defense by the defendant in this case? We will consider these questions in the order stated.

1. Is there a federal question involved in this case?

The following cases decided by this Court, as it seems to us, effectually settle this question in favor of the plaintiff in error if he brings his case within their purview.

Gelpcke v *Dubuque*, 1 Wallace U. S., 175, 205, 206.

Chicago v. *Sheldon*, 9 Wallace U. S. 50, 55, 56.
Olcott v. *Supervisors*, 16 " " 678, 690, 691.
Douglass v. *County of Pike*, 101 U. S., 677, 686-7.
And cases cited.
Louisiana v. *Pillsbury*, 105 U. S., 278, 294, 295.
Anderson v. *Santa Anna*, 116 " 356, 361, 362.

By these and numerous other cases that might be cited, the following proposition of law is clearly settled and established.

A contract in any way dependent upon a Statute, or upon the uniform judicial construction of a Statute by the Courts of the State, which is valid by the terms of the Statute as construed by the Courts at the time of its execution, cannot be rendered invalid, either by a subsequent change of the Statute by the legislature, or by a subsequent change of the *construction* of the Statute by the Courts.

This Court, in the case of Douglass v. County of Pike, cited above, speaking through Chief Justice Wait, say: "After a Statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the Statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

CONTRACT IN QUESTION.

This contract is in the form of a deed executed by a husband and wife to the vendor of the plaintiff in error, executed on the 25th day of February, 1870, conveying to said vendor the lands of the wife, and the validity of theis deed depends upon the sufficiency of the certificate of the acknowledgement of the deed by the wife.

Our contention is that by the uniform construction of the Statutes of Virginia in relation to the acknowledgement of deeds by married women by the Courts of Virginia prior to the creation of the State of West Virginia, and by the Courts of West Virginia of the Virginia Statute in force at that time, said Statute, with other laws of Virginia, were adopted and made the laws of the State of West Virginia by Article XI, Sec. 8, of the first Constitution of West Virginia, which took effect June 20, 1863. This provision of that Constitution reads thus: "Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant

thereto, shall be and continue the law of this State until altered or repealed by the Legislature." By this provision not only the Statute of Virginia in relation to the acknowledgement of deeds by married women, but the uniform construction of that Statute as to the sufficiency of the acknowledgements of deeds by married women under it, became the law of the State of West Virginia.

Cases decided by the Court of Appeals of Virginia, in which the Statutes of that State referred to were construed.

Harvey and wife v. *Borden*, 2 Washington, 156. This was the first reported case on this subject in that State, and was decided in 1795, and the act in question in the case was passed in 1748. We have not this act at hand, but the provision of it in question fully appears in the case.

The act required the privy examination of a married woman to be taken by two commissioners appointed for the purpose. Its wording was, "that it shall be lawful for the clerk to issue a commission to two or more commissioners being justices of the peace," etc., who should take and certify the acknowledgement of the married woman. The commission in this case was directed to two persons by name, but did not designate them as "justices of the peace." They took and certified the acknowledgement of the married woman, but do not say in their certificate that they were "justices of the peace," nor sign it as such. But the Court unanimously held the commission and certificate to be sufficient. We refer to this case as an example of the liberal construction by the Court at that early day of the Statute in regard to the certificate required, as to acknowledgement of deeds by married women And this liberal construction was never departed from in that State.

Ware v. *Cary*, 2 Call, 222, decided in 1800. This is the next reported case in Virginia.

In this case the commission for the examination of the wife was issued in *blank*, that is, it was directed to ———, gentlemen, greeting: and it did not style them as justices. The two gentlemen were in fact justices of the peace, but they did not state themselves to be such in their certificate, nor sign their certificate as such. But they proceeded to execute this commission, and certified as follows: "By virtue of this commission hereto annexed, we the subscribers have personally applied to the within named *Judith Jordan*, and have examined her privately and apart from the said *Samuel Jordan*, her husband, do certify that she

declares that she freely and voluntarily acknowledges the conveyance contained in the said indenture, which is hereto annexed, without the threats or persuasions of her husband, and that she is willing and desirous the same should be recorded in the County Court of Buckingham. Given under our hands and seals this fourteenth day of March, one thousand seven hundred and eighty-one, in the 5th year of the Commonwealth,

CHARLES MAY, [L. S.]
HENRY BELL, [L. S.]"

The Court decided this certificate to be sufficient, and held the deed to be binding upon the wife.

Langhorne v. *Hobson*, 4 Lee, 224, decided in 1833, under the Statute of that State passed in 1792. This Statute was as follows:

"When husband and wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in Court, and being examined privily and apart from her husband, by one of the Judges thereof, shall declare to him that she did freely and willingly seal and deliver said writing to be then shown and explained to her, and wishes not to retract it, and shall before the said Court acknowledge the said writing, again shown to her, to be her act,—or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the *United States of America*, who may be empowered by commission, to be issued by the clerk of the Court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgement, the wife being examined privily and apart from her husband by those commissioners, shall declare that she willingly signed and sealed the said writing, to be then shown and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return, with the commission, and thereunto annexed, a certificate under their hands and seals of such privy examination by them and of such declaration made and consent yielded by her,—in either case, the said writing, acknowledged also by the husband, or proved by witness to be his act, and recorded together with such privy examination and acknowledgement before the Court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman."

In this case a widow brought suit to recover her dower in a tract of land conveyed by herself and husband in 1807, when the statute of 1792 was in force, and the point in controversy was the sufficiency of her acknowledgement of that deed, as certified by the justices who took it. The statute of 1792, is found in full in a note on page 225 of the case. Her examination was taken under a commission directed to two persons, without describing them as justices of the county, though they were justices, in fact. Their certificate endorsed on the commission was as follows: "In obedience to the within commission to us directed, we have personally waited on the within named *Susannah Langhorne* wife of the within named *William Langhorne*; and examined her privily and apart from her said husband; and she, the said Susannah, acknowledged the deed hereto annexed to be her act and deed, and declared that she did the same freely and voluntarily without the persuasion or threats of her said husband, and also relinquished her right of dower in the land within mentioned conveyed by the said deed, and is willing that the same, with this her acknowledgement, should be recorded in our County Court of Cumberland—we, the subscribers, having read the said deed and explained the same to the said ————" the name of Mrs. *Langhorne* being left out of the certificate.

The statute authorizing this mode of acknowledgement required—

1st. That the wife should be examined privily and apart from her husband.

2d. That she should "declare that she willingly signed and sealed the said writing to be then shown and explained to her by them," the commissioners.

3d. That she consented that the writing might be recorded, and

4th. That the commissioners should certify and return under their hands and seals, with the commission, "such privy examination by them, and of such declaration made, and consent yielded by her."

The certificate in this case failed to comply with the statute in about every thing required to be done by them, except the privy examination of the wife. The statute required her, after such privy examination, to "declare that she had willingly *signed and sealed* the writing to be *then* shown and explained to her." Not that she should acknowledge the writing to be her act and deed, as is stated she did in the certificate, wholly omitting the plain requirement

of the statute.

It fails to show that the commissioners, at he time she acknowledged the writing to be her act and deed, *then* showed and explained to her the writing which she acknowledged to be her act and deed. Their statement at the end of their certificate that "we, the subscribers, having read the said deed and explained the same to the said ———," can as well be construed to mean that they did this at any other period of the transaction, as at the time of her said acknowledgement, and they leave it to be guessed at as to whom, if any one, they read and explained the deed. And then, again, the statute required that the deed should be *shewn* and explained to the wife at the time she is called upon to make her declaration that she willingly signed and sealed it, clearly in order that she might know that it was the same writing she had thus signed and sealed, and not that it was *read* and explained to her.

But it can't even be determined that the commissioners read the deed to Mrs. *Langhorne* at all, from what they say. Their certificate says: "We, the subscribers, having read the said deed and explained the same to ———." Not that they had read it to Mrs. Langhorne, or to any one else, but that they, themselves, had read it, and that after reading it, they had "explained the same to ———."

And yet the Court, following the principle of construction adopted from the first, held the certificate sufficient, and the deed binding upon Mrs. *Langhorne*. The case was ably argued by counsel against the sufficiency of this certificate, no counsel appearing on the other side, and the Court of Appeals, without giving an opinion, simply affirmed the decree of the Court below, holding the certificate to be sufficient.

Tod v. *Baylor*, 4 Leigh, 498.

This is the next reported case in Virginia. It was a suit in equity by the widow of *John Baylor* for her dower in certain lands conveyed to *George Tod*, in 1801 and 1803. The first deed was not signed by the wife of Baylor, but the other was signed by both of them. Both deeds were acknowledged by Mrs. Baylor, and the certificates of her acknowledgement to both deeds were precisely alike. The Court below decided that the plaintiff was entitled to dower in both tracts of land, by reason of the insufficiency of the certificates of acknowledgement of said deeds, and the defendant *Tod* appealed. On the appeal her right to dower in the tract of land conveyed by the deed which she

did not sign, was affirmed, and as to the tract, the deed to which she did sign, the decree was reversed, and her acknowledgement of both deeds was held good. This case was also decided under the act of 1792, and the certificate of her acknowledgement was as follows:

"Agreeably to the power to us granted by the within commission, we have this 10th August, 1802, personally gone to *Mrs. Anne Baylor* and examined her privily and apart from her said husband,—who makes to us her acknowledgement of the conveyance of 320 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband, and that she is willing the same shall be recorded in the County Court of Caroline."

This case was argued in the Court of Appeals by Stannard, who afterwards became Judge of that Court, and by Benjamin Watkins Leigh, one of the ablest lawyers Virginia ever produced. And the Judges of the Court, departing from their former course in such cases, all but one of them, delivered written opinions in the case. Judge Green, one of the five Judges of the court, did not sit in any of the cases reported in this volume, by reason of sickness. Judge Tucker, the President of the Court, discusses the case as to the certificate of acknowledgement very thoroughly (see pp. 512–13–14–15 of the case), and holds with all the other judges, that the certificate was sufficient. And the special and particular attention of the court is invoked to the reasoning of Judge Tucker in support of this certificate, and the considerations which influenced him in his decision of the question.

It is hardly necessary to say anything as to this eminent ability and great legal learning of Judge Tucker. And his fame as a jurist is, to say the least, equal to that of any Judge who ever sat as a member of the Court of Appeals of Virginia.

The certificate which he holds to be good in the case fails in two very important particulars to conform, in words, to the requirements of the statute.

1st. The requirement of the statute is that the wife shall *declare* (not acknowledge) that she willingly *signed* and *sealed* the said writing *to be then shown and explained to her by them*, the commissioners. The certificate fails to state that she *declared* she had willingly *signed* and *sealed* the deed, but in lieu thereof says, after stating her privy examination, "who makes her ac-

knowledgement of the conveyance of the 320 acres of land," &c., and it wholly omits to say that the writing she acknowledged was *then*, or at any other time, shown or explained to her. The fact of this failure is commented on by the Judge, and on page 513 of the case he says: "If the question was now of the first impression I should be for construing the statute with very great strictness. It prescribes the mode in which a person *may* convey, whose power of conveying was before circumscribed to the forms known to common law. * * * * It ought, therefore, to have been required to be strictly complied with; a literal compliance would not indeed have been demanded, but a substantial compliance in everything material. I fear, however, that the practice of the country, ever since the introduction of the commission, has been very far from conforming to the requisitions of the law with anything like strictness. The alternative is, therefore, presented of abating somewhat of this rigor or of running the risk of shaking land titles. If the case of dower was alone in question, it would be less important, but the conveyances of the maiden land of *femes covert* would also be involved. Our predecessors, accordingly, seem to have been cautious in their decisions upon the laws which were the originals of this statute." He then refers to the cases of *Harvey vs. Borden*, *Ware vs. Cary*, and *Langhorne vs. Hobson*, to all of which he gives his sanction.

The Judge then preceeds to state what facts are essential to be stated in the certificate in order to transfer the title of the wife, as follows:

Those facts are: 1st, her privy examination, apart from her husband; 2d, her knowledge of the act done; 3d, her acknowledgement of the conveyance; 4th, her declaration that that acknowledgement is free and voluntary; and 5th and last, her consent that it may be recorded. If these facts substantially appear, the certificate is good; and though not certified in so many words, if they satisfactorily appear, it will suffice. Now, in this case it is expressly certified, 1st, that the *feme* was privily examined apart from her husband; and 2d, that she acknowledged the conveyance of the 320 acres of land contained in the indenture thereto annexed; 3d, her knowledge of the nature of the act she was doing appears from the certificate that she acknowledged the conveyance of *the* 320 acres of land contained in *the* deed; for how could they certify that fact unless she knew that that deed did convey that 320 acres? 4th, This

acknowledgement was made freely and voluntarily; and lastly, she consented it should be recorded."

In 1814 an act was passed by the legislature of Virginia changing the law in respect to the privy examination of married women and giving a form for the certificate of such examination. This act, as to this matter, provided as follows:

"It shall be lawful for any two justices of the peace in any county or corporation within the United States or the territories thereof within which such *feme covert* may be, to examine her privily and apart from her husband respecting the said conveyance, and to take and certify her acknowledgement thereof to the following effect: '——— county (or corporation) to wit: We, A. B. and C. D., justices of the county (or corporation) aforesaid in the State (or territory) of ———, do hereby certify that E. F., the wife of G. H., parties to a certain deed for the conveyance of real estate to J. K., bearing date on the ——— day of ——— and hereto annexed, personally appeared before us in our county (or corporation) aforesaid, and being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same and that she wished not to retract it. Given under our hands and seals this ——— day of ———.

A. B. [Seal]
C. D. [Seal]'"

Hairston v. *Randolphs*, 12 Leigh, 445.

This is the first reported case under that statute. The certificate of the acknowledgement of the wife in this case was as follows:

"City of Richmond, to-wit: We, J. P. and W. H. F., magistrates of the said city, do hereby certify that Mary, wife of the within named D. M Randolph, both of them parties to the deed within executed, personally appeared before us, and separately and apart from her husband, and acknowledged that she had willingly executed the said deed on her part, and wished not to retract it."

This certificate failed to comply with the form prescribed in the following particulars:

1. It did not show that the acknowledgement was taken within the county of Henrico, or in the corporation of Richmond.

2. It failed to show that the wife was examined by the

magistrates.

3. It failed to show that the deed was fully explained to her.

4. It failed to state that she acknowledged the deed to be her *act* and *deed*.

5. It failed to state that she *declared* that she had *willingly, signed, sealed* and *delivered* the deed.

And in lieu of all this, it simply stated that the wife had *acknowledged* that she had *willingly executed* the said deed on her part, and wished not to retract it.

And the court, as we have seen, following out the same line of policy and the same rule of construction, theretofore adopted and practiced, unanimously decided that this certificate was a substantial compliance with the law, *except in one particular*—to wit: that it did not state that the deed *was fully explained to the feme*. If this had been stated in the certificate, the court would have held it good, and the deed binding on the *feme*.

If this statement had been inserted in the certificate, it would have read as follows:

"That Mary, wife of the within named D. M. Randolph, both of them parties to the deed within executed, personally appeared before us, and separately and apart from her husband, *and having the deed aforesaid fully explained to her*, and *acknowledged* that she had *willingly executed* the said deed, on her part, and wished not to retract it."

The certificate in this form, according to the five eminent judges who decided this case, would have been a substantial compliance with the law in *every* particular, and the deed would have been binding on the wife.

And attention is called to the language of Judge Allen in delivering the opinion of the Court in this case, on pages 459, 460 of the case.

"The certificate in the case under consideration varies from the form prescribed in several respects; but enough appears upon its face to shew that the law was substantially complied with except in one particular; the justices do not certify that the deed was fully explained to the *feme*, nor is there anything in the certificate from which, in my opinion, we are authorized to refer, that at the time of the acknowledgement of the deed she had knowledge of its contents." It is plain from this that if their *had* been *anything* in the certificate, no matter in what language it was expressed, from which the court could have *inferred*

that when she acknowledged the deed she knew its contents, they would have held it sufficient.

This case was decided in 1841, and the deed was acknowledged by the wife in 1816.

McClanahan et al v. *Siter, Price & Co.*, 2 Grattan, 280.

The deed in question in this case was executed in 1831, after the revision of 1819 of the laws of Virginia and the act of 1814 was inserted in that revision and appears in chapter 99, sec. 15. 1. Revised Code of 1819, p 365. No material change is made in the law or in the certificate of the acknowledgement of a wife of a deed. The section required the justices to certify the privy examination of the wife, &c., by a certificate annexed to the deed to the following effect:

"COUNTY OR CORPORATION &c.

"We A. B. and C. D., justices of the peace in the county (or corporation) aforesaid, in the State (or territory or district) of ———, do hereby certify that E. F. the wife of G. H., parties to a certain deed, bearing date on the ——— day of ———, and hereto annexed, personally appeared before us in our county (or corporation) aforesaid; and being examined by us, privily and apart from her husband, and having the deed aforesaid fully explained to her, she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. Given under our hands and seals this ——— day of ———.

A. B. [Seal]
C. D. [Seal]"

And this was the law in force at the date of the execution and acknowledgement of the deed in question in this suit, except that the word "executed" had been substituted for the words "signed, sealed and delivered." The certificate of the acknowledgement of the wife of this deed is as follows: "She the said Virginia A., having been by us first *made acquainted with the contents* of said deed, and examined *separately and out of the hearing* of her said husband, whether she executed the same, freely and voluntarily, and without any compulsion or under influence of her said husband or fear of his displeasure, she acknowledged that she executed said deed freely and voluntarily, and without any compulsion or influence of her said husband, and that she does not wish to retract it; and

the said grantors desired us to certify this deed and acknowledgement to the Clerk of Greenbrier County Court, in order that the same may be recorded." p. 283 of the case.

This certificate was objected to as insufficient, but the Court in their opinion delivered by Judge Baldwin, made short work of the objection. On page 294 of the case the Judge says: "There is no substance, I think, in the objection taken to the certificate by the justices of the privy examination of the *feme*. They certify that she was examined 'separately and out of the hearing of her husband.' This I consider equivalent to the words used in the form given by the statute, 'privily and apart from her husband.'" And in view of the way this decision has been treated by our friends on the other side, we think it proper to call the attention of the court to the fact that the same judges, with one exception, who decided the case of *Hairston* v. *Randolphs*, 12 Leigh, decided this case. Judge Tucker had in the meantime resigned and Judge Baldwin had been elected in his place. And this liberal construction of the statutes in reference to the certificates of acknowledgement of deeds by married women, in order, if possible, to sustain their validity, had become so fixed and settled that the court in this case did not see proper to discuss it.

Grove v. *Zumbro*, 14 Gratian, 501.

This is the next and last reported case in Virginia prior to the creation of this State. It was decided in 1858, and the deed in question in it was executed in 1833, and acknowledged in the same year by the wife before a court in Tennessee. The certificate of acknowledgement by the wife, after certifying the acknowledgment of the husband, was as follows:

"The court thereupon proceeded to take the private examination of the said Mary Zumbro, wife of the said John Zumbro, separate and apart from her said husband, who acknowledged that she executed said conveyance freely and voluntarily, and without any fear, persuasion or coercion of her said husband."

This certificate, like that in the two preceding cases, departed from the form prescribed by the act of 1819, already set out in this brief in almost every particular.

1. She did not "declare" to the judge who examined her, "that she did freely and willingly seal and deliver the said writing."

2. The certificate fails to show that the deed was at *any*

time "shown and explained to her."

3. The certificate fails to show that she *declared* any thing to the judge who examined her, or to the court

4. It failed to show that she acknowledged the deed "to be her act," and

5. It fails to show that she *declared* "that she did not wish to retract it." And for this last failure, alone, the certificate was held to be defective

On pages 513–14 of the case, the court says:

"It has long been held that the requisitions of the statute need not *literally*, but must *substantially* be complied with. To demand a literal compliance with them would be unnecessarily to obstruct the alienation of property and throw a cloud over titles. To dispense with the substance of any of them would be to deprive the wife of some of those safeguards which the law has provided for her protection."

And in support of this liberal construction of the statute, they quote nearly all the former decisions of the court on the question, with approval, and, among them, the case of *Hairston* v. *Randolphs*, in which Judge Allen, the then president of the court, had delivered the opinion. And in reference to this case they say: "It was conceded that though the form of the certificate was given by law, yet it would be sufficient if to the same effect, though not in the same words. Indeed, the law so expressly declared. The certificate in that case varied from the form prescribed, in several respects; but it was considered that it substantially complied with the law, except in one particular: that the justice did not certify that the deed was fully explained to the wife, nor was there any thing in the certificate from which her knowledge of its contents, at the time of her acknowledgment, could be inferred. And for that defect, the deed was decided to be void as to the wife."

Thus the law on this subject stood in Virginia, at the adoption of the constitution of 1863, of West Virginia, except that form of the certificate as to the acknowledgment of the wife, was changed by section 4 of chapter 121 of the Code of Virginia of 1849, as to the declaration to be made by her, so as to read, "and declared that she had willingly executed the same," thus substituting the word "executed" for the words "signed, sealed and delivered," as in the form given in the acts of 1814 and 1819.

As already stated, these statutes and decisions of the legislature and courts of Virginia became the laws of West

Virginia by the section of her Constitution of 1863, already quoted. And now let us see what the legislature and the courts of West Virginia have done in reference to this same matter as to the certificates of the acknowledgment of the deeds of married women prior to the 25th day of February, 1870, the date of the deed in question in this suit.

Section 4, of chapter 73, of the Code of West Virginia of 1868, requires the officer taking the acknowledgment of a married woman to certify the same, to the following effect, to-wit:

"State (or territory or district) of ———, county of ———, to-wit:

"I, —— ——, a commissioner appointed by the governor of the state of West Virginia, for the said state (or territory or district) or ———; [or, I, —— ——, a justice for the county aforesaid, and township of ———; or, I, —— ——, recorder of the said county; or, I, —— ——, a notary public for the county aforesaid; or, I, —— ——, prothonotary (or clerk) of the —— court of said county], do certify that —— ——, the wife of —— ——, whose names are signed to the writing above (or hereto annexed), bearing date on the —— day of ——, personally appeared before me, in the county aforesaid (or, if it be a commissioner, in the state, territory, or district aforesaid; or if it be a justice, in the township aforesaid), and being examined by me privily and apart from her husband, and having the said writing fully explained to her, she the said — —, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it. Given under my hand, this —— day of ———."

And this was the law in force in West Virginia when the deed in question was executed.

Independent of the adoption of the laws of Virginia by the Constitution of 1863, when the legislature of West Virginia adopted the statute of Virginia whereby the above form of certificate was enacted, she adopted all the decisions of the Courts of that State, construing the statutes of the state in *pari materia*.

There are but two reported cases in West Virginia on this subject prior to the 25th day of February, 1870, the date of the deed in question in this suit, and of its acknowledgment by Mr. Pennybacker. The first is *Burtlett* v. *Fleming*, 3. West Va. 163 and the other is *Wise* v. *Postleurait*, 3 West Va 452.

In the first case the certificate was held bad, and it was

bad. (1) Because she acknowledged the deed to be her act jointly with and in the presence of her husband. And (2) all she did in her privy examination was to desire her acknowledgment of the deed to be certified to the clerk in order that the deed might be recorded, and in addition to this the deed was not explained to her at any time, so far as the certificate shows. In the case of *Wise* v. *Postlewait*, the deed in question in that case was executed by one Howard and wife to William Hogue, April 15th. 1797. There were several deeds involved in the decision of the case and they were all acknowledged in the county court of Monongalia county and ordered to be recorded, page 456 of the case, and the deed in question had an endorsement at the foot of it, "signed, sealed and delivered in the presence of the court," and this was all there was in reference to its acknowledgment by the married woman.

Judge Maxwell in delivering the opinion of the court says: It seems to me that this is a substantial compliance with the act of 1792, requiring conveyances to be acknowledged. To sign, seal and deliver a deed must be equivalent to acknowledging it. The copy was therefore properly admitted evidence." Page 458 of the case.

And thus the law stood at the date of the execution and acknowledgment of the deed in question in this suit by Mrs. Pennybacker, the wife of J. M. Pennybacker.

The certificate of the acknowledgment of Mrs. Pennybacker to this deed is as follows:

"STATE OF WEST VIRGINIA,
County of Cabell }

"Personally came before me, the undersigned recorder of the county and State aforesaid, Sarah H. G. Pennybacker, wife of the above mentioned John M Pennybacker, and party to the foregoingdeed,and being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Sarah H. G. Pennybacker, *acknowledged* that the had *willingly* signed, sealed and delivered the same, and wished not to retract it.

"Given under my hand and seal this 25th. day of February, 1870.

THO J. HAYSLEP, Recorder. [Seal.]"

At the time of this acknowledgement of her deed to Mr. Huntington conveying the land in question to him, we had a uniform line of decisions by the courts of Virginia extending through 74 years, construing the several statutes of Virginia as to the sufficiency of one certificate of the acknow-

ledgement of a married woman. of a deed conveying real estate, and one such decision by the Supreme Court of Appeals of West Virginia in reference to the same question. And all of them. without exception, hold that it is not necessary to the validity of such certificate, that either the language of the statute, or of the form contained *in* the statute, should be used in the certificate, if the language used in lieu of it, is sufficient to enable the court to see, or to fairly inter from it, that the requirements of the statute have been substantially or in *effect*, complied with.

It is not necessary that we should refer to the several cases decided by the courts of West Virginia construing these statutes between the time of the execution of the deed in question, and the decision of the Court of Appeals of West Virginia, holding a certificate of acknowledgement of Mrs. Pennybacker of the deed in question to be defective and her said deed to be void. All of the said decisions are in harmony with the decisions of the courts of Virginia referred to, until we reach the case of *Blair* v. *Sayre* 29. West Va. 604.

But before considering this case we desire to call attention to the case of *Pickens* v. *Knisely*, 29 West Va., 1. That case was decided but little over five months before that of *Blair* v. *Sayre*. And the opinion in both cases was given by the same judge, and the opinion in this case was given by this same judge.

The certificate of the acknowledgement of the wife in Pickens v. Knisely was as follows:

"WEST VIRGINIA, BARBOUR COUNTY, TO-WIT:

"I, *Mixel* Simon, Justice of Union Township, in the county aforesaid, do certify that Sarah Jane Knisely, the wife of the above named L. M Knisely, personally appeared before me in my township and being examined by me privily and apart from her husband and having the above deed of trust *date* December 15th, 1868, fully explained to her, she, the said Sarah Jane Knisely, acknowledged the said *wrightly* to be her act and declared that she had willingly acknowledged the same and did *knot* wish to retract it. Given under my hand this 18th day of December, 1868.

MICHAEL SIMON, Justice."

It is rather remarkable that the court in their opinion make no reference to any case decided in Virginia upon this subject.

But they decided this certificate to be sufficient and the deed valid, and according to the previous decisions in Virginia and West Virginia their decision was right. They say in their opinion on page 7 of the case, "And when she declared that she 'had willingly acknowledged the deed,' she meant that she had willingly signed and sealed the deed free from the control of her husband, and that *act* she did not wish to retract."

A very *liberal* construction we must admit, and one proper to be made to uphold the deed. But to have said that her declaration that she had willingly *acknowledged* the deed was *equivalent* to saying that she had willingly *executed* the deed, would not have been true. The *execution* of a deed and the *acknowledgement* of it after it is executed, are two very different things. The same liberality of construction would have held the certificates of acknowledgment in this case and in the case of *Blair* v. *Sayre* to be sufficient and the deeds valid. In the case of *Blair* v. *Sayre* the certificate of the acknowledgement of the wife, so far as it appears in this case, is as follows:

"I further certify, that Nancy J. Blair, wife of the said E. F. Blair, being examined by me privily and apart from her said husband and having the writing aforesaid fully explained to her, she the said Nancy J. Blair, *acknowledged* that she had willingly executed the same and does not wish to retract it."

The certificate of Mrs. Pennybacker of the deed in question in the case now before the court, as we have already seen, as to this same matter reads, "She the said Sarah H. G. Pennybacker *acknowledged* that she had *willingly* signed, sealed and delivered the same, and wished not to retract it." Both acknowledgments are in substance the same thing, and both were held bad.

By this construction of the statutes and certificates of acknowledgments of the married women of their deeds conveying real estate, the Court of Appeals of West Virginia were not only out of harmony with the decisions of the Court of Virginia concerning said statutes and certificates of acknowledgement, but they are out of harmony with themselves. And this *change of construction* whereby a deed which was valid at the time of its execution and acknowledgement, becomes void and of no effect if this last decision of the Court of West Virginia is allowed to stand.

The counsel of the defendant in error, on page 10 of his brief, denies that there has been any change of construction in the matters alleged by us on the part of the plaintiff in error, and asserts that the construction of the Courts of Virginia and West Virginia, upon the matters in question, has always been the same. If this be true, then the certificate of acknowledgement of Mrs. Pennybacker would have been bad and her deed in question void as to her, under the decisions of the Courts of Virginia and of the decisions of the Court of Appeals of West Virginia in the cases of *Wise* v. *Postlewait* and *Pickens* v. *Knisely*.

Is this true? Let us see. Turning back to several of the cases decided by the Court of Appeals of Virginia and West Virginia, it will appear, beyond all question, that the certificate of the acknowledgement of Mrs. Pennybacker of her deed in question, was good and sufficient under the statutes then in force in West Virginia as construed by the courts of both States prior to that date, and that her deed was valid.

As we have already seen, the statute of 1792 required the justices of the peace who took the acknowledgement of a deed by a married woman, to certify, among other things, that she *declared* that she had willingly signed and sealed the said writing to be *then* shown and explained to her by them. But it did not require that she should acknowledge the deed to be her act. In the case of *Langhorne* v. *Hobson*, decided under this act, the certificate stated that Mrs. Langhorne "*acknowledged* the deed to be her act and deed" (a thing not required by the statute) "and declared that she did the same" (that is, that she acknowledged the deed to be her act and deed) "freely and voluntarily, without the persuasions or threats of her said husband." She did not "declare that she had willingly signed and sealed" the deed, as the language of the statute required. This requirement was the same as if the word "executed" had been used in the place of "signed and sealed." And this case would have been a sufficient authority for the decision of our Court of Appeals in the case of *Pickens* v. *Knisely*. And they say in that case, without reference to *Langhorne* v. *Hobson*, that when Mrs. Knisely *declared* that she "had willingly acknowledged the deed, she meant that she had willingly executed it; that is, she declared that she had willingly signed and sealed the deed free from the control of her husband," thus expressly deciding that the *signing and sealing* of the deed, and

the *execution* of the deed, were the *equivalent* of each other, which was correct. And this was just what was decided in *Langhorne* v. *Hobson*, and just what was decided *the other way*, as we shall see in the case now before the court.

In *Tod* v. *Baylor*, also decided under the act of 1792, the certificate of the examination of the wife failed to show that she declared anything, and in lieu of *any* declaration by her, the certificate says she "makes to us her acknowledgment of the conveyance 320 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband." And the court held the certificate to be good, and the deed valid. Here again holding that the *acknowledgment* of the wife of the conveyance of the land, freely and voluntarily by her, was the equivalent of the *declaration* required by the statute, that she had *signed* and *sealed* the deed.

The act of 1814 was the first act that gave a form of certificate of the examination of married women in the acknowledgment of deeds. It did not require that the form should be followed literally, but that the certificate should be, *in effect*, what was stated in the form. The language of the form was, "She the said K. F. acknowledged the same (the deed) to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it."

In the case of *McClanahan et al* v. *Siter, Price & Co.*, the certificate as to the wife says: "She acknowledged that she executed said deed freely and voluntarily, and without any compulsion or influence of her said husband, and that she does not wish to retract it." And this certificate, as we have seen, was held sufficient by the Court of Appeals of Virginia. And the court will observe that in this certificate the wife instead of *declaring* in the language of the form, that "she had willingly signed, sealed and delivered" the deed, she *acknowledged* that she *executed* "said deed freely and voluntarily," &c.

Now let us compare this language with the language used in the certificate of the acknowledgment of the deed in question in this case by Mrs. Pennybacker as follows: "She the said Sarah H. G. Pennybacker, *acknowledged* that she had *willingly* signed, sealed and delivered the same, and wished not to retract it."

Neither of the certificates states that the married woman

acknowledged the deed to be her act and deed, or to be her act. And neither of them *declared* anything. And the certificate in the first named case stated that the wife acknowledged that she had *executed* the deed freely, &c. instead of that she had willingly *signed, sealed* and *delivered* the deed as prescribed in the form, while in this case the certificate states that Mrs. Pennybacker *acknowledged* that she had willingly *signed, sealed* and *delivered* the deed, instead of that "she had willingly *executed* the deed," the language of the form then prescribed. The Court of Appeals of Virginia, by their decision, necessarily and properly held that the language used in the first named certificate was a sufficient compliance with the requisitions of the statute, both as to the acknowledgment of the deed and the declaration required to be made by the wife, and that the signing, sealing and delivering of the deed and the execution of the deed, as mentioned in the forms, were one and the same thing.

In the case of *Hairston* v. *Randolphs*, decided previous to the case of *McClanahan* v. *Siter, etc.*, the certificate of the acknowledgment of the wife was, in this respect, the same as that in the last named case.

The certificate in that case stated that she "acknowledged that she had willingly executed the said deed on her part, and wished not to retract it." The Court held the certificate so far as this matter was concerned to be good, but held it bad for the reason, alone, that it did not state that the deed was *explained* to the wife. And in this case it was held that the words "acknowledged that she willingly executed (not *signed, sealed* and *delivered*, as prescribed in the form) the said deed on her part, was a sufficient compliance with the requisitions of the statute, both as to the acknowledgment and declaration prescribed by the form given.

And the same thing, precisely, is true as to the certificate in the case in *Grove* v. *Zumbro*.

And we submit here and now that the certificate of the acknowledgment of Mrs. Pennybacker, is, beyond all question, a good and valid certificate, and that her deed was a good and valid deed, if there had never been a decision on the subject prior to its date. And if this were a writ of error to a decision of a circuit court of the United States in which the same decision had been made as in the State court, we would have no fears of what that decision would be.

But this, alone, is not sufficient for this case. We

must show that a federal question is involved, and we submit, with perfect confidence, that we *have* shown it, if a change of a statute, or if the settled and uniform construction of a statute by the courts, under which the deed in question in this case was good and valid at the time it was executed and acknowledged, renders that deed void and of no effect, as the decision of the State court does in this case, if it is not reversed and set aside.

That the decision in the case of Laidley vs. Land Co. construing the Pennybacker deed as invalid was a radical and entire change of construction of the statute must be evident on even [redacted], a causal examination of the cases above cited showing how the statutes had been at all times theretofore construed. If further evidence was needed of that fact we might cite the case of Bensimer vs. Fell decided by the Supreme Court of West Virginia March 7th. 1891 to be reported in 35 West Va. In that case the certificate has its caption "State of West Virginia Greenbriar county to wit:" and certifies the officer to be "a justice of the peace in and for the county aforesaid," but does not show that the woman appeared before him in *his county* "and also certifies that the woman came before me and having been examined by me privily and apart from her husband, and having had the deed aforesaid fully explained to her, she the said E. A. C. acknowledged the same to be her act and deed and declared that she had willingly *signed* the same and that she wished not to retract it."

Then the omission of the words "in his county" and the use of the word "signed" in place of executed was held not to vitiate the deed of the married woman.

This construction we contend was much more liberal than to have held the Pennybacker deed valid showing that the court of last resort in West Virginia in the decision of the Laidley case holding the Pennybacker deed void had departed from the long line of uniform decisions which had in such cases became a rule of property right and that it had in the Bensimer vs. Fell case seen its error and gotten back in harmony with its old rulings.

The certificate as to the acknowledgment of Mrs. Pennybacker, shows:

1, That she was examined "privily and apart from her husband," in the language of the statute and the form given by it.

2. That the deed *after* such examination was "fully explained to her," also in the language of the statute and

form given, and

3, That after this "privy examination" and *full* "explination" of the contents and legal effect and purpose of the deed she "*acknowledged* that she had willingly *signed sealed* and *delivered* the same, and wished not to retract it." The italics are ours. This was only in part the language used in the form, as to the acknowledgement of the deed as her *act* and the *declaration* that she had "willingly executed the same." But in legal "effect" it was precisely the same thing, as decided long years before in the cases above cited.

2, Does it sufficiently appear by the record that another question was also involved in the case upon which the decision of the court below could properly have been affirmed by the Court of Appeals of the State, regardless of the federal question?

We submit that the order of the Circuit Court of Summers county, relied on by the Counsel of the defendant in error to show this, (page 7. of his brief) does not sustain this ground of objection to the jurisdiction of this Court, in this case. The order is found on pages 198-9, of the record. As appears by the record, pages 200, 201, 202, when the case was called for trial in the circuit court of Cabell county, the plaintiff, Laidley, "moved the court to render judgment upon the said order of September 5th, 1888, and the agreement of the defendant therein contained in favor of the plaintiff against the defendant for a fee simple estate in the lands in the declaration mentioned." This motion was objected to by the defendant, and the court took time to consider of it until the next day, and on the next day, May 13, 1890, the court overruled the motion and entered the following order which is found on pages 201 and 202 of the printed record:

"This day came the parties by their attorneys and thereupon the court doth overrule the motion of the plaintiff made on yesterday for judgment against the defendant pursuant to the conditions and agreements of the order entered in this cause on the 5th day of September, 1888, and refused to enter said judgment to which ruling of the court the plaintiff objected and excepted and his said exceptions answered to him, and thereupon this plaintiff tendered his statement of his claim for profits and other damages which he means to demand in this suit, which is ordered to be filed

and on his motion it is ordered that the amount of said damages and the allowance for improvements, if any, be postponed until after the verdict in the trial is rendered. Thereupon came a jury to-wit * * * who were drawn, selected, tried and sworn according to law * * * and the jury having heard part of this evidence were adjourned * * * and the case was regularly tried by the jury, which failed to agree, and were discharged." The entry of the order of September 5, 1888, to work an estoppal must have been followed by a judgment of the court, when the Circuit Court of Cabell County, which had jurisdiction, passed on that point and decided against the plaintiff, that decision was conclusive. The evidence of the parties on the motion of the plaintiff for judgment is not in the record, and the presumption, thereforo, is that the motion was properly overruled. At the next term of the court the case was again tried by a jury, and a verdict, under the instructions of the court, was found for the plaintiff. But the motion for judgment on the order of the Circuit Court of Summers County, was not made at this term of the court, and the effect of that order was not passed upon by the court in any of the instructions given by it to the jury. The plaintiffs asked for seven instructions to the jury, each and all of which were objected to by the defendant, and all of them were given by the court to the jury. The defendant asked for two instructions both of which were refused. The instructions of the plaintiff are found on pages 255, 256 of the record, and those of the defendant on pages 256, 257 of the record. So that the effect of the order of the Circuit Court of Summers County relied on by the defendant in error in support of these motions, was neither presented to nor passed upon by the Circuit Court of Cabell County at the final trial of this cause in that court, and it cannot be inferred or presumed that it was passed upon by the Court of Appeals of the State in refusing the writ of error applied for by the defendant to the decision of the court below.

But the *federal question* was plainly and distinctly presented to the Circuit Court of Cabell County on the trial of this case by defendant's instruction number one, and was refused by the court, as appears by defendant's instruction number *one* on the pages aforesaid of the record. And which is the same record presented to the Court of Appeals of the State upon the petition of the defendant for a writ of error to the judgment of the court below. By this petition of the defendant and the third assignment of error con-

tained in it, the attention of that court was specially called to the defendant's instruction number *one* in which the federal question was distinctly raised. Printed record, p. 195.

And the decision of the court of appeals of the State refusing the writ of error and supersedeas prayed for, is found in the printed record, pages 193, 194. But both the petition and decision of the court, are out of their proper places in the record. The court of appeals, as will be seen, filed no opinion, so as to enable us to see the grounds, with absolute certainty, upon which they based their declared, "opinion that the judgment complained of is plainly right." But it is fair to presume that they based their decision of the correction of the instructions of the court below in favor of the plaintiff to the jury, which practically decided the case in favour of the plaintiff, and left nothing for the jury to do after overruling the two instructions asked for by the defendant, but to find a verdict for the plaintiff.

There can be no question of the fact that the Court of Appeals decided the *federal question* presented by the record to them, adversely to the plaintiff in error, and there can be as little question that they did *not* refuse the writ of error by reason of the order of the Circuit Court of Summers County.

The contention of the defendant in error is that "it must affirmatively appear from the record not only that the right under the constitution *was specially set up or claimed*, but also that it was acted upon by the State Court, and decided adversely to the claimant or the jurisdiction (of this court) does not exist."

If this contention be true in the sense evidently intended by the counsel that all this must appear "affirmatively" by the decision of the State Court of last resort, then all that court would have to do, to deprive this court of jurisdiction, would be, to do as was done in this case, to file no opinion in the case at all. But we submit that it *does* affirmatively appear from the *record* in this case that the right claimed "under the constitution was specially set up or claimed" in the State Court, "but also that it was *acted upon* by the State Court, and decided adversely to the claimant."

The *federal question* was properly raised by the instruction number *one* of the defendant asked for and refused on the trial of the case in the Circuit Court. And that it was set and claimed in the petition for the writ of error presented to the State Court of Appeals by the *third*

assignment of error in said petition, and was necessarily acted on by said court and decided adversely to the plaintiff in error, in the refusal to allow the writ of error and supersedeas prayed for. See as to this matter *Chicago Life Insurance Co.* v. *Needles*, 113 U. S., 574.

And it is plain from the instructions of the court given for the plaintiff in the trial in the court below, that the decision of the case in both the State Courts turned upon unconstitutional decision of the State Court of Appeals in the case of *Blair* v. *Sayre, supra.*

And it will hardly be claimed that one unconstitutional decision of the Court of Appeals of West Virginia was sufficient to sustain a subsequent decision of the same court of the same identical point, so as to deprive this court of jurisdiction of the last case so decided.

3. Was the federal question sufficiently and in due time set up and claimed by the defendant as a defense in this case?

We think it was and we know of no decision of this court which decides the contrary. We have always labored under the impression, and the practice in West Virginia has been in strict accordance with this impression, that when the decision of a Circuit Court in an action of ejectment is set aside by the Court of Appeals and the case sent back for a new trial, the defendant may make any defence to the action he may have, regardless of whether he set it up on the former trial or not. In the action of ejectment the only plea that can be filed by the defendant is the plea of "not guilty," and any and every defence he may have, may be made under that plea.

And on this point that the order of the Supreme Court of Appeals of West Virginia of November 26, 1887, was not a final order but an interlocutory order in reference to the following cases:

Bostwick v. *Brinkerhoff*, 106 U S., 3, which holds that

"A judgment of reversal by a State Court with leave for further proceedings in a court of original jusisdiction is not subject to review here," and case of

Johnston v. *Keith*, and another, 117 U. S., page 199, which holds that "a judgment of reversal in a State Court accompanied by an order remanding this case for retrial is not a final judgment for the purpose of a writ of error to this Court."

The case of Laidley vs. The Central Land Company, re-

ported in 30 W. Va., 505, was reversed and remanded to the Circuit Court of Cabell County for a new trial and consequently the defendant, the Central Land Company, could not apply to the Supreme Court of the United States for a writ of error because the decision was not final.

For the reasons above stated the Central Land Company respectfully asks that the motion to dismiss for want of jurisdiction and to affirm the judgment be denied, and that the court retain the case for its adjudication on the federal question which is involved in the case.

Respectfully submitted,

JAMES H. FERGUSON,
HENRY C. SIMMS,
F. B. ENSLOW,
Attorneys for Appellant.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

THE CENTRAL LAND COMPANY, OF WEST VIRGINIA, Plaintiff in Error,

VERSUS

JOHN B. LAIDLEY, DEFENDANT IN ERROR.

It is deemed proper to add a word in reply to the brief filed by J. H. Ferguson, H. C. Simms and F. B. Enslow upon two points: 1st, as to the effect of the estoppal by record; 2d, as to the effect of defendant's instruction No. 1.

The first ground upon which this motion is based is as follows:

"The judgment can be sustained on two distinct grounds, one of which does not involve a federal question."

One ground upon which plaintiff asked a verdict was that upon a comparison of titles the plaintiff had a sound title, while the defendant deraigned title under a void deed.

The other ground was that by a certain agreement entered into in open court and made a matter of record and acted upon by the court and the parties in this action,—the final determination of a certain chancery suit described in the agreement between the same parties, about the same mat-

ter, was made conclusive of the plaintiff's right to judgment in this action.

To avoid the effect of this estoppal, the attention of the court has been called to the action of the circuit court of Cabell county in overruling a motion by Laidley for judgment upon the record and agreement above referred to.

The motion was based upon the theory that the court, having granted a stay of the action of ejectment upon the condition that if final decree should go for Laidley in the chancery cause referred to in the order, then the Land Company would suffer judgment in the action of ejectment without further defense or delay.

The condition having been satisfied, it was supposed that the court would compel the Land Company to suffer judgment. But the court was of the opinion that the order showing the agreement in open court together with the chancery record whereby the latter was made conclusive of this action, was proper evidence to be submitted to the jury, and so the motion was overruled,

The motion was addressed to the court before the trial.

Under the West Virginia code only one plea—the general issue, may be received in the action of ejectment.

The estoppal could not therefore be set up as a bar by way of plea. But in the trial before the jury the estoppal was read in evidence, and was, of itself, conclusive of the plaintiff's right of recovery. It was a separate and distinct ground from the question proposed in defendant's instruction No. 1 and plaintiff's instruction No. 5.

The agreement was for a valuable consideration and it was to the effect that the decision of the chancery case should be conclusive of this case In that there can be no question of Federal appellate jurisdiction. And the record does not disclose any attempt to avoid the effect of that agreement.

2d. As to the effect of defendant's instruction No. 1.

It was not necessary for the court to pass upon the pretended Federal question, in refusing to give the instruction, because the question is not made. The proposed instruction, in effect tells the jury that if they find for the defendant the two isolated facts stated therein, viz: that defendant is in possession claiming title under a conveyance from C. P. Huntington, and that he purchased, paid for and took possession of the land under a deed from Jno. M. Pennybacker and S. H. G. Pennybacker, dated February 25th, 1870, then they must find for the defendant, (the court instructing the

jury that the deed last referred to was a valid deed.)

By such an instruction, it is plain, that the court would take from the jury the evidence showing the plaintiff's title, as well as the evidence showing that the Pennybacker title was paramount to the plaintiff's. It would take from the jury the evidence showing that both parties claimed under a common title, consequently that both were estopped to question its sufficiency. It also ignores the evidence of the estoppel by record referred to in the first part of this reply. It would substitute the court as the trier of the omitted facts. In order to raise the pretended Federal question it should read as follows, or to the like effect:

"If the jury find from the evidence that the plaintiff, Laidley, claims title by deed, from S. H. G. Pennybacker, and that the defendant, The Central Land Company, claims by deed from C. P. Huntington, who claims by deed from S. H. G. Pennybacker prior in date to Laidley's deed, and that Laidley had notice actual or constructive of the prior conveyance at the time of his purchase, then they must find for the defendant, notwithstanding the decision of the Supreme Court of Appeals in this case, rendered on the 27th day of November, 1887, declaring Huntington's title deed aforesaid null and void, because the court instructs the jury that said decision is invalid, in that it places an improper construction upon the State statute to which it relates, in violation of Article 1, section 10 of the Constitution of the United States."

The contention of the opposing counsel is that the decision in question impairs the obligation of contracts and is the passage of a law by a State in violation of the constitutional prohibition.

The answer to this question is as follows:

First. The question itself is not raised by the instruction, because it is defective, and the court did not necessarily pass on any such question in refusing the instruction but only enforced the rules of pleading and practice.

Second. The decision was not the passage of a law by a State, but merely the construction of a law, the validity of which was not questioned.

In the case of The Miss. & Mo. R. R. Co. vs. McClure, 10 Wall. 511, similar in principle to the point proposed here, Mr. Justice Swayne says: "The State has passed no law upon the subject. The constitution of the State which as construed by the Supreme Court of the State, has worked the result complained of, was in force when the bonds were

issued. The 25th section of the Judiciary act of 1789, specifies the questions of which we can take cognizance, in this class of cases, and expressly excludes all ~~of them~~ from our consideration."

Third. In fact the refusal of a court to enforce a valid contract is not the passage of a law avoiding the contract, as held in Knox vs. The Exchange Bank, 12 Wall, 379.

Fourth. And again in point of fact the decision does not violate the contract, the construction is in harmony with former decisions and not in conflict with them.

Fifth. Finally the judgment in ejectment in this case can be sustained on two distinct grounds, without passing on the instruction No. 1, relative to the pretended Federal question.

First: *Instruction No. 5, for plaintiff, which was given, does not, it is admitted, raise any Federal question. It declares simply the construction of the State statute involved*, and this was the sole ground of the first decision in this case and is sufficient of itself to sustain the second judgment without reference to Instruction No. 1, if the proposed question had been passed on by thecourt.

Second. The consent agreement making the chancery case an estoppal, referred to in the first part of this brief, constitute sufficient evidence to sustain the judgment without reference to the validity of the Huntington deed.

In their brief counsel for the Land Company admit that Instruction No. 5 does not raise any Federal question. See top of page 2.

Indeed counsel for the Land Company admit that the doctrine of Gilpecke vs. Dubuque does not apply to this case. They say if this were a writ of error to a circuit court of the United States, that court having original jurisdiction by reason of the non-residence of the parties, this court would not be bound to follow the State decisions, and in that event no fear would be entertained by them as to the result. (Brief page 21.)

Respectfully submitted,

JAMES F. BROWN,
Attorney for J. B. Laidley.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND COMPANY, OF WEST VIRGINIA, PLAINTIFF IN ERROR,

vs.

JOHN B. LAIDLEY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Brief of Counsel for Plaintiff in Error.



SUPREME

Court of the United States.

THE CENTRAL LAND COMPANY, OF WEST VIRGINIA, PLAINTIFF IN ERROR,

vs.

JOHN B. LAIDLEY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Brief of Counsel for Plaintiff in Error.

STATEMENT OF THE CASE.

By deed dated August 18, 1865, Rebecca J. Everett conveyed to Mrs. Sarah H. G. Pennybacker, a tract of land situate in Cabell county, West Virginia, containing 240 acres, more or less, in consideration of $8,000.00 cash paid. Record, pp. 23, 24.

At the date of said deed Mrs. Pennybacker was the wife of John M. Pennybacker, but that fact does not appear upon the face of the deed.

And by deed dated February 25, 1870, Mrs. Sarah H. G. Pennybacker, together with her husband, John M. Pennybacker, conveyed the said 240 acres of land, less one acre, reserved in the deed, to C. P. Huntington, in consideration of $11,000.00 cash paid. Record, pp. 25, 26, 27.

And on October 16, 1871, the said C. P. Huntington conveyed the said tract of land together with a large number of contiguous tracts, by deed, to the Central Land Company, of West Virginia, the plaintiff in error. See record, pp. 31, 32, for the conveyance of this tract. At the date of the deed for this tract to C. P. Huntington, it was in use as a farm, only, but it, as well as the other lands, so conveyed to the plaintiff in error, were all purchased by Mr. Huntington for the purpose of building the city of Huntington thereon, and with a view of the construction of the Chesapeake and Ohio Railroad through and over the same. And all of the said lands were conveyed by Mr. Huntington to the said Central Land Company of West Virginia for the same purpose.

Sometime in the year 1881, John M. Pennybacker, the husband of Mrs. Sarah H. G. Pennybacker, died. And on January 26, 1882, the said John B. Laidley, the defendant in error, as is claimed by Mrs. Pennybacker (see record pp. 72, 73, 74) by representing to her that she had a dower interest in said lands conveyed by her and her husband to Mr. Huntington, as aforesaid, prevailed upon her to convey the same to him for the consideration of $500.00, of which sum he paid her $100.00 in cash and gave her his note for the balance. For her said deed to Laidley, see record pp. 24, 25.

At the date of this deed the City of Huntington had been built to a very large extent, on the 239 acres of land so conveyed to Mr. Huntington, as aforesaid. And the Chesapeake and Ohio Railroad had been completed and was in successful operation from Richmond, Virginia, to the Ohio river through this tract of land, and to the Kentucky line, where it connected with other railroads running south and west. The value of this tract of land at the date of said deed, with the buildings thereon erected by the plaintiff in error, and its vendees, was from fifty thousand to one hundred thousand dollars, and the land and buildings are now worth at least $200,000.

Immediately after procuring his said deed, the said John B. Laidley commenced an action of ejectment in the Circuit Court of Cabell County, West Virginia, against the said Central Land Company of West Virginia, and others, its vendors, for the recovery of said tract of land. Record, pp. 2, 6.

And afterwards he commenced another action of ejectment in the same court, against the same parties, for the recovery of the same land. Record, pp. 8, 9. And these actions were consolidated by the court and tried as one. Record, pp. 11, 12. The case was afterwards tried by a jury in said court and a verdict was found for the defendants, and judgment was rendered by the court for the defendants on that verdict. Record pp. 12, 13, 14.

The plaintiff, John B. Laidley, procured a writ of error and *supersedeas* to said judgment, from the Supreme Court of Appeals of West Virginia, and the same was reversed by that court, and the case was remanded to the Circuit Court of Cabell county for a new trial therein. See Laidley v. Land Co., 30 West Va. 505.

When the case was re-docketed for trial in that court, it was, on motion of the plaintiff, Laidley, removed to the Circuit Court of Summers county, West Va., and there docketed for trial. Record pp. 197, 198. No trial of the case was, however had in that county, and on the 6th day of May, 1889, the said action of ejectment was, by an order of said Court, remanded to the Circuit Court of Cabell county and there again docketed for trial, Record p. 199. And on the 4th day of September, 1890, the case came on again for trial in that court, and the jury empannelled in the case, under the instructions of the court, found a verdict for the plaintiff, Laidley, for the lands mentioned and described in his declaration. And the defendant, The Central Land Company of West Virginia, thereupon moved the Court to set aside said verdict on the grounds that the same was contrary to the law and the evidence, which motion the court overruled, and gave judgment for the plaintiff in said verdict. To which decision and judgment of the court the said defendant excepted and filed its bill of exceptions to the opinions and decisions of the court mentioned therein. Record, pp. 204, 205, 206.

For said bill of exceptions. See Record pp. 206 to 258.

And at a Supreme Court of Appeals of the State of West Virginia held in Charleston in said State, on the 14th day of November, 1890, the defendant, The Central Land Company of West Virginia (now plaintiff in error) petitioned said Court, in due form of law, for a writ of error and *supersedeas* to the said judgment of the Circuit of Cabell county, in favor of the plaintiff, Laidley, and an order and judgment was made and entered by said Supreme Court of Appeals thereon, as follows:

"This day came the Central Land Company, of West Virginia, by Simms & Enslow, Esqs., its attorneys, and presented a petition duly certified by counsel, praying for a writ of error and *supersedeas* to a judgment of the Circuit Court of Cabell county rendered on the 12th day of September, 1890, in two causes consolidated, in which John B. Laidley was plaintiff and the said petitioner was defendant, with a transcript of the record of the judgment aforesaid accompanying the petition, which being seen and inspected by the court, the writ of error and *supersedeas* prayed for is refused because the court is of opinion that the judgment complained of is plainly right; and the petitioner desiring to present to the Supreme Court of the United States a petition for a writ of error to this judgment, leave is hereby given the said petitioner to withdraw the petition and transcript of record aforesaid for that purpose."

Record, pp. 193, 194, 195.

For the instructions given by the Circuit Court of Cabell county for the plaintiff, to the jury, and excepted to by the defendant. See record, pp. 255, 256.

And for the instructions asked for by the defendant to be given to the jury, and which the said court refused to give. See record, pp. 256, 257.

There were seven instructions to the jury asked for by the plaintiff in the court below, all of which were objected to by the defendant, but they were all given to the jury by the court. The defendant asked for two instructions to the jury, both of which were objected to by the plaintiff and refused by the court.

The contention of the defendant in the trial below, before the jury, was that under and by virtue of the decisions of the courts of Virginia, prior to the creation of the State of

West Virginia, as to the sufficiency of the certificate of the acknowledgment, by married women, of their deeds conveying real estate, the deed of Mrs. Sarah H. G. Pennybacker and her husband to C. P. Huntington for the land in question in this suit, was a good and valid deed, and that the title of Mr. Huntington to the land thereby conveyed to him, was perfect. And the *first* instruction asked for by the defendant we respectfully submit, fairly and sufficiently presented for the consideration of the Court and jury, the federal question involved in that instruction. And we further, respectfully, submit, that the *sixth* instruction asked for by the plaintiff and given by the Court to the jury, *plainly* and distinctly told the jury that the decision of the Supreme Court of Appeals of West Virginia in this case when it was before that Court, was binding upon them, and they *must* find a verdict for the plaintiff regardless of any and all federal or other questions raised in the case.

The only question in contest in this case in the court below, as to the validity of the deed of Mrs. Pennybacker to Mr. Huntington, was in reference to the certificate of acknowledgment by her of her said deed; the plaintiff Laidley contending that this certificate was fatally defective, and the defendants contending that by the uniform construction of the Statutes of Virginia regulating the acknowledgment of deeds by married women conveying their interest in real estate, by the Courts of Virginia prior to the creation of the State of West Virginia, the said certificate of acknowledgment by Mrs. Pennybacker, of her said deed was valid and sufficient, and her said deed was a valid and sufficient conveyance of the real estate therein mentioned, to C. P. Huntington. And that this construction of the Statutes of Virginia, by the courts of that State, was binding upon the Courts of this State, so far as the deed of Mrs. Pennybacker and her husband to Mr. Huntington was concerned. This contention of the defendants was decided adversely to them, both by the Circuit Court of Cabell county, and by the Supreme Court of Appeals of West Virginia, on the petition of the defendant, The Central Land Company, of West Virginia, for a writ of error and *supersedeas* to the judgment of the

Circuit Court of Cabell County. And thereby it is most respectfully submitted, a federal question arose in this case of which this Honorable Court has jurisdiction.

ASSIGNMENT OF ERRORS.

The Central Land Company of West Virginia, the plaintiff in error, assigns the following errors in the judgment and proceedings of the Circuit Court of Cabell County in this case and in the judgment of the Supreme Court of Appeals of the State of West Virginia, affirming the judgment of the said Circuit Court of Cabell County.

First. The Circuit Court of Cabell County erred in overruling the objections of the defendant, The Central Land Company of West Virginia, to the instruction of No. 6, asked for by the plaintiff, Laidley, and in giving said instruction to the jury notwithstanding said objections.

Second. The said Circuit Court erred in sustaining the objections of the said plaintiff to the said instruction No. 1 asked for by the said defendant, and in refusing to give said instruction to the jury.

Third. The Supreme Court of Appeals of West Virginia, erred in holding and deciding that the judgment of the Circuit Court of Cabell county complained of by the said Central Land Company of West Virginia in its said petition to that court, for a writ of error and *supersedeas* to said judgment, was *plainly right*, and in refusing to grant the writ of error and *supersedeas* so prayed for.

Fourth. The said Supreme Court of Appeals erred in *not* holding and deciding that the judgment and proceedings of the Circuit Court of Cabell county complained of in said petition of The Central Land Company of West Virginia, were erroneous, and in refusing to grant the writ of error and *supersedeas* prayed for in said petition, in order that the said judgment and proceedings might have been reviewed and reversed by said Supreme Court of Appeals.

Fifth. The said Supreme Court of Appeals by their order and judgment rendered and entered on the said petition of the defendant, The Central Land Company of West Virginia refusing to grant the writ of error and *supersedeas* prayed for, as

aforesaid, affirmed the judgment of the Circuit Court of Cabell county complained of in said petition which was error, and

Sixth. The Supreme Court of Appeals of West Virginia, by their order and judgment entered and rendered in this case, decided the federal question involved herein, adversely to the defendant, The Central Land Company of West Virginia, which was error.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

In 1748, an Act was passed by the Collonial Legislature of Virginia, providing among other things, for the acknowledgment of deeds by married women conveying their interest in real estate. *Hennings Statutes at Large*, Vol. 5. p. 410, Sec. 5, of said Act provided for the acknowledgment of such deeds by *femes covert*, before a court, and Section 6, provided as follows: "And that where any *feme covert* cannot conveniently travel to the general court, or Courty Court, to acknowledge her deed for passing away her estate, it shall be lawful for the clerk of the general court, or of any county court, to issue a commission to two or more commissioners, being justices of the peace in the county where such *feme* resides, for receiving the acknowledgment of any deed of such *feme covert*, for passing her estate in any lands, tenements, or hereditaments; and such deed acknowledged before them, after they shall have examined her privily, and apart from her husband, touching her consent and thereof certified the judges before whom such commission shall be returnable, shall be recorded, together with the commission and return, and shall be as effectual as if the same had been personally acknowledged in court, by such *feme covert*."

The first reported case which arose under this Statute was *Harvey* v. *Borden*, 2 Washington, 156, decided by the Court of Appeals, of Virginia, in 1795. The contention in the case was as to the sufficiency of the commission issued by the clerk of the Court to the commissioners to take the acknowledgment of the deed in question by the *feme covert*. This commission was directed to two persons as commissioners, but it failed to say that they were justices of the peace. And the certificate of these commissioners of the acknowledg-

ment of the deed by the *feme covert*, also failed to say that they were justices of the peace. The court below held the commission and certificate a sufficient compliance with the Statute, and the Court of Appeals affirmed this judgment, unanimously. And Judge Fleming in his opinion says: "The first objection made by the appellant's counsel to the decree was, that the commission was not so directed, or returned, as to pass the estate of Mrs. Prichard. It is duly executed by the persons to whom it was directed, and the clerk is required to address it to *justices of the peace.*

The deed with the commission is returned and admitted to record. I do not think that we carry the doctrine of presumption beyond its accustomed limits when we say that to support this deed, we will 'intend that the law has been obeyed unless the contrary appear.' And thus, in the very outset, the courts of Virginia set the precedent of a liberal construction of the Statute in the right direction, to *support the deed.* And this precedent they followed down to the creation of the State of West Virginia. *Ware* v. *Cary*, 2 Call. 222 (2nd Ed.) was the next reported case under this statute.

The commission issued by the clerk in this case was as follows:

"Buckingham Sc—The Commonwealth of Virginia: To ——gentlemen, greeting: Whereas, *Samuel Jordan* and *Judith*, his wife, by their certain indenture of feofment bearing date the 14th day of March, 1781, and hereto annexed, have sold and conveyed unto *John Nicholas*, the fee simple estate of and in a certain tract or parcel of land, containing two hundred acres of land, more or less on the south side of Fluvanna river; and whereas, the said *Judith* can not conveniently travel to the said County Court of Buckingham to make acknowledgment of the said conveyance. You, or any two of you, are therefore commanded to go to the said *Judith*, and receive her acknowledgment of the same, and examine her privily and apart from the said *Samuel Jordan* her husband, whether she doth the same freely and voluntarily, without the pursuasions or threats of her said husband, and whether she be willing that the same should be recorded in our said County Court, and when you have received her acknowledgment and examined her as aforesaid, that you distinctly and plainly certify the same to the said County Court under your hands and seals, sending then there the said indenture and this writ. Witness: *Rolfe Eldridge*, clerk

of our said court, at the court-house, the 14th day of March, in the 5th year of the commonwealth.

ROLFE ELDRIDGE."

This commission was executed and returned by two persons, as follows:

"Buckingham County, to wit: By virtue of this commission hereunto annexed, we the subscribers have personally applied to the within *Judith Jordan*, and have examined her privily and apart from the said *Samuel Jordan*, her husband, do certify that she declares that she freely and voluntarily acknowledges the conveyances contained in said indenture, which is hereto annexed, without the threats or persuasions of her husband, and that she is willing and desirous the same should be recorded in the County Court of Buckingham.

"Given under our hands and seals this fourteenth day of *March*, one thousand seven hundred and eighty one, in the 5th year of the commonwealth.

CHARLES MAY, (L. S.)
HENRY BELL, (L. S.)"

The Court below held the commission sufficient and the deed good. And the Court of Appeals unanimously affirmed the decision without a written opinion. This decision was far in advance of the other in the way of a liberal construction of the statute. Here the commission was issued in *blank*. It was addressed to no person, and any two persons might have executed it. The words *justices of the peace* are not found either in the commission or in the return of it by Charles May and Henry Bell.

In 1792 the Legislature of Virginia passed an act which, among other things, provided as follows:

"When husband and wife have sealed and delivered a writing purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, shall declare to him that she did freely and willingly seal and deliver said writing to be then shown and explained to her, and wishes not to retract it, and shall before the said court acknowledge the said writing, again shown to her, to be her act—or if before two justices of the peace of that county in which she

dwelleth, if her dwelling be in the *United States of America*, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment, the wife being examined privily and apart from her husband by those commissioners, shall declare that she willingly signed and sealed the said writing, to be then shown and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return, with the commission, and thereunto annexed, a certificate under their hands and seals of such privy examination by them and of such declaration made and consent yielded by her—in either case, the said writing, acknowledged also by the husband, or proved by witness to be his act, and recorded together with such privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose as if she were an unmarried woman."

The first reported case, decided under this statute, was *Langhorne* v. *Hobson*, 4 Leigh, 224. This case was decided in 1833; the only point in issue being the sufficiency of the acknowledgment by Mrs. Langhorne of the deed of herself and husband, dated November 25th, 1807. Her acknowledgment of this deed was taken under a commission directed to *John Woodson and Samuel Hobson* (without describing them as justices of the peace of the county, though the report of the case says they were so in fact). And their certificate of her examination and acknowledgment of the deed was as follows:

"In obedience to the within commission to us directed, we have personally waited on the within named *Susannah Langhorne*, wife of the within named *William Langhorne;* and examined her privily and apart from her said husband; and she, the said Susannah, acknowledged the deed hereto annexed to be her act and deed, and declared that she did the same freely and voluntarily without the persuasion or threats of her said husband, and also relinquished her right of dower in the land within mentioned conveyed by the said deed, and is willing that the same with this her acknowledgment, should be recorded in our County Court of Cumberland—we, the subscribers, having read the said deed and explained the same to the said———."

The requirements of the statute under which this commission was issued, were, (1) That the wife should be examined by the justices, privily and apart from her husband. (2) That she should declare that she had willingly signed and sealed the said writing to be then shown and explained to her by them. (3) That she consented that the same should be recorded, and (4) That the commissioners should certify by their return under their hands and seals, with the consent aforesaid, "such privy examination by them, and of such declaration made, and consent yielded by her."

The certificate of the acknowledgment of her deed by *Mrs. Langhorne* failed to comply with the requirements of the statute, according to its language, in nearly every particular, except as to her privy examination.

1. It fails to say that Mrs. Langhorne *declared* "that she willingly signed and sealed the said writing" "then shown and explained to her," but in lieu thereof the certificate says, that she "acknowledged the deed hereto annexed to be her act and deed, and declared that she did the same freely and voluntarily without the pursuasion or threats of her husband, and also relinquished her right of dower in the land within mentioned conveyed by the said deed. And is willing that the same, with her acknowledgment, should be recorded in our County Court of Cumberland."

2. It fails to say that said deed was shown and explained to Mrs. Langhorne, either, at the time she acknowledged the deed, or made the declaration aforesaid. But in lieu thereof the certificate closes with these words, "we, the subscribers, having read the said deed and explained the same to the said ———."

The court will notice here, that in acknowledging the deed to be "her act and deed," Mrs. Langhorne did what she was not required to do by the Statute. What the Statute *did* require her to do, was to "declare that she willingly signed and sealed the said writing, *then* to be shown and explained to her by them," the commissioners. And what she *did* declare was, *not* that she had willingly signed and sealed the writing shown and explained to her, but she "declared that she did the same freely and voluntarily, without the persuasion or threats of her husband." Now what was it she so declared

she had done? It was that she had freely and voluntarily without the persuasion or threats of her husband, "*acknowledged* the deed" annexed to the commission, "to be her act and deed," (italics ours.) And when, if ever, was the deed *read* and explained to Mrs. Langhorne? Was it before, during, or after her privy examination? The certificate is *blank* as to *whom* the deed was read and explained. And in order to hold the deed good, the Court had to *presume* that it was *shown* (not read) and explained to Mrs. Langhorne *during* her privy examination.

The Court below held the certificate sufficient and the deed good. And Mrs. Langhorne appealed. The case was elaborately argued by able counsel in the Court of Appeals for the appellant; no counsel appearing for the appellee. And the Court without filing a written opinion, affirmed the decision of the court below.

The next reported case under the statute of 1792 was *Tod* v. *Baylor*, 4 Leigh, 498. This was a suit in equity brought by Mrs. Anne Baylor, widow of John Baylor, deceased, for her dower in certain lands conveyed by her husband to *George Tod* in 1801 and 1803. The deed of 1801 was not signed and sealed by Mrs. Baylor, but was acknowledged by her. The deed of 1803 was signed, sealed and acknowledged by Mrs. Baylor, as well as by her husband. The certificate of the acknowledgment of the deed by Mrs. Baylor, as stated in the case, was as follows:

"Agreeably to the power to us granted by the within commission, we have this 10th August, 1802, personally gone to *Mrs. Anne Baylor*, and examined her privily and apart from her said husband—who makes to us her acknowledgment of the conveyance of 320 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband, and that she is willing the same shall be recorded in the County Court of Caroline."

This certificate follows the language of the statute as to the privy examination of Mrs. Baylor, and substantially as to her consent that the deed may be recorded. And this is all. She did not *declare* "that she had willingly signed and sealed the deed." In fact, she made no declaration whatever. But in

lieu of this the certificate reads: "Who makes to us her acknowledgment of the conveyance of 320 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband." And the certificate fails to say that the deed was either shown or explained to Mrs. Baylor at any time. The certificate appended to the other deed was precisely like this one, except as to the dates, and the court below held both certificates bad and the deeds void, and gave the widow dower in both tracts and Tod appealed. And after full argument of the case for both parties by two of the ablest lawyers in the State of Virginia, the Court of Appeals unanimously decided that the certificates to both deeds of the acknowledgment of Mrs. Baylor were a substantial compliance with the requisitions of that statute, and that she was not entitled to dower in the land conveyed by the deed of 1808, which she had signed and sealed, but that she was entitled to dower in the land conveyed by the deed of 1801, which she did not sign. And particular attention is called to the opinion of Judge Tucker, President of the Court, commencing on page 511 of the case, which for the convenience of this Honorable Court, we here insert.

"Tucker, P. The first question in this case, arises on the construction of the statute of conveyances of 1792. Disencumbering that section of the statute, of those words which are not immediately necessary in deciding this question, it provides that 'when husband and wife shall have *sealed* and *delivered* a writing purporting to be a *conveyance* of any estate or interest, if, before two justices of the peace who may be empowered by commission *to examine her privily* and *take her acknowledgment*, the wife being examined privily and apart from her husband, shall declare that she willingly *signed* and *sealed* the said writing, *to be then shown and explained to her by them*, and consented that it may be recorded. And the said commissioners shall return with the said commission, and thereto annexed, a certificate under their hands and seals of such privy examination and declaration, and consent yielded by her,' then the deed shall be binding on the wife. According to this statute, the *commission* ought to recite, that the husband and wife had sealed and delivered a conveyance purporting to be a conveyance (here setting forth succinctly of what, or otherwise referring to the writing so as to describe it) and

should empower the justices to examine her privily and take her acknowledgment of the said writing; and such commission, without more saying, would be good; for it is in the words of the law. And even if not literally in those words, yet if it be substantially so, it will suffice, or many titles in the country would be shaken. Thus, in the present case, though it is not stated, in terms, that the parties had sealed and delivered a conveyance, it is stated that 'by indenture (which is a writing sealed and delivered) dated the 12th October, 1803, they had sold and conveyed' an estate, *etc.* This is a substantial compliance, and therefore good.

Now as to the *certificate.* The law is not content with the justices merely echoing the commission by certifying that they *had privily examined the wife, and she had acknowledged the writing;* but it goes on to prescribe what shall be certified by them. The wife, being examined privily and apart from her husband, must declare that she willingly *signed* and *sealed* the writing, *to be then shown and explained to her;* and must consent that it be recorded. The justices are then to certify *such* privy examination (that is, that she was examined privily and apart from her husband), and such declaration made (that is, that she willingly signed and sealed the writing), and such consent yielded by her (that is, that it be recorded). Nothing can be more clear than the construction of this clause, except as to the words 'to be then shown and explained to her, they do not seem, by a literal construction, to require the fact of showing and explaining the deed to be expressly certified; for they stand out, as it were, from the rest of the clause, and seem merely directory. Yet, as in acts *in pais*, those presumptions are not usually made that everything has been rightly done unless the contrary appears, which are made by law in relation to the transactions of a court, it has been always my impression that, in strictness, this matter also must be certified or must in some form appear. If the question was now of the first impression, I should be for construing the statute with great strictness. It prescribes the mode in which a person *may* convey whose power of conveying was before circumscribed to the forms known to the common law. It is an innovation upon that law; it prescribes a form of conveyance unknown to it. It ought therefore, to have been required to be strictly complied with; a literal compliance would not indeed have been demanded, but a substantial compliance in everything material. I fear, however, that the practice of the country, ever since the introduction of the commission, has been very far from conforming to the requisitions of the law with anything like strictness. The alternative is, therefore presented of abating

somewhat of this rigor or of running the risk of [illegible] land titles. If the case of dower was alone [illegible] would be less important, but conveyances of [illegible] lands of *femes covert* would also be involved. [illegible] sors, accordingly, seem to have been cautious [illegible] upon the laws which were the originals of [illegible] *Harvey* v. *Borden*, 2 Wash. 156, *it did not appear from any part of the record, that* the commissioners were [illegible] as was required by the Statute of 1748; they were not styled in the commission; yet the Court overruled the objection, Judge Roane saying: 'the law requires the clerk to direct it to such persons, and *he ought not to be presumed to have done wrong;*' and *Judge Fleming* said, 'I do not think we carry the doctrine of presumption beyond its accustomed limits, when we say that to support this deed' *we will intend that the law has been obeyed* unless the contrary appear. In *Ware* v. *Carey*, 2 Call. 268, the *names* of the justices were omitted; the commission was directed to ——— gentlemen justices; it was executed by two persons who certified that they acted by virtue of the commission thereto annexed; but they did not say 'directed to us,' nor did they certify that they were justices of the peace; yet the objection was overruled. Influenced by like considerations in the recent case of *Langhorn* v. *Hobson*, this Court overruled the objections to the commission and privy examination, and ratified the title of the purchaser.

What, then, let it be asked, is essential in the certificate? The answer is, that it should ascertain satisfactorily, in some form or other, those facts which the law deems essential to the transfer of the title of the *feme*. Those facts are, 1, her privy examination apart from her husband; 2, her knowledge of the nature of the act done; 3, her acknowledgment of the conveyance; 4, her declaration that that acknowledgment was free and voluntary; and 5, and last her consent that it may be recorded. If these facts substantially appear, the certificate is good; and though not certified in so many words, if they satisfactorily appear, it will suffice. Now in this case, it is expressly certified. 1, that the *feme* was privily examined apart from her husband; and 2, that she acknowledged the conveyance of the 330 acres of land contained in the indenture thereto annexed; 2, her knowledge of the nature of the act she was doing, appears from the certificate that she acknowledged the conveyance of the 330 acres contained in the deed; for how could they certify that fact, unless she knew that the deed did convey that 330 acres? 4. This acknowledgment was made freely and voluntarily; and lastly, she consented it should be recorded. If this

certificate be not sufficient, I fear there are few that are so in the commonwealth."

(The attention of the court is here called to a mistake in the opinion of Judge Tucker in quoting the commission issued by the clerk in the case of *Ware* v. *Carey*, 2 Call. p. 224 (2d Ed.) In quoting that commission Judge Tucker's opinion reads: "The commission was directed to———gentleman justices;" when by reference to the case, it will be seen that it reads: "The Commonwealth of *Virginia*, to ———, gentlemen, greeting;" and not "gentlemen justices." The mistake was probably made by the printer and not by the judge.)

This decision, as we view it, is of special importance to the decision of the federal question involved in the decision of the case now before this honorable court. As already stated, with the exception of the privy examination of the wife, the certificate of her acknowledgment of the deed in question in that case ignores the *language* of the statute in about everything contained in it. In the place of the explanation of the deed to her and her acknowledgment of it, the certificate says that she "makes to us her acknowledgment of the conveyance of 320 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband." And she failed to *declare* that she willingly *signed* and *sealed* the deed, or to make *any* declaration in lieu of it.

In 1814, the Legislature of Virginia passed an act amending the statutes of the state, in relation to the acknowledgment of deeds by married women, which provided as follows:

"It shall be lawful for any two justices of the peace in any county or corporation within the United States or the territories thereof within which such *feme covert* may be, to examine her privily and apart from her husband respecting the said conveyance, and to take and certify her acknowledgment thereof to the followiug effect: '——— (county or corporation) to wit: We, A. B. and C. D., justices of the county (or corporation) aforesaid in the State (or territory) of ———, do hereby certify that E. F., the wife of G. H., parties to a certain deed for the conveyance of real estate to J.

K., bearing date on the ——— day of ——— and hereto annexed, personally appeared before us in our county (or corporation) aforesaid, and being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same and that she wished not to retract it. Given under our hands and seals this ——— day of ———.

A. B. [Seal.]
C. D. [Seal.]" "

The first reported case under the act of 1814, was *Hairston* v. *Randolphs*, 12 Leigh. 445.

In that case the certificate of the acknowledgment of the wife, who was seized in fee, of the land in question, was as follows:

"City of Richmond, to wit: We, J. P. and W. H. F., magistrates of the said city, do hereby certify that Mary, wife of the within named D. M. Randolph, both of them parties to the deed within executed, personally appeared before us, and separately and apart from her husband, and acknowledged that she had willingly executed the said deed on her part, and wished not to retract it."

This certificate failed to comply with the form prescribed in the following particulars:

1. It failed to show that the wife was *examined* by the magistrates.

2. It failed to show that the deed was fully explained to her.

3. It failed to state that she acknowledged the deed to be her *act* and *deed*.

4. It failed to state that she *declared* that she had *willingly signed, sealed* and *delivered* the deed.

And in lieu of all this, it simply stated that the wife had *acknowledged* that she had *willingly executed* the said deed on her part, and wished not to retract it.

And yet, in the face of all these failures, the Court of Appeals of Virginia unanimously held that this certificate of the acknowledgment of the deed in question by Mrs. Mary Ran-

dolph, wife of D. M. Randolph, was a substantial compliance with the statute of 1814, except in one particular, which was that it failed to show "that the deed was fully explained to the *feme*." If the justices had certified this fact, simply in addition to what they did certify, the certificate would have read as follows: "City of *Richmond*, to wit: We, J. P. and W. H. F. magistrates of said city, do hereby certify that Mary, wife of the within named *D. M. Randolph*, both of them parties to the deed within executed, personally appeared before us, and separately and apart from her husband, and having the said deed fully explained to her, she acknowledged that she had willingly executed the said deed on her part, and wished not to retract it," and would have been held sufficient. In delivering the opinion of the Court (pp. 459, 460 of the case) Judge Allen says:

"The certificate in the case under consideration, varies from the form prescribed in several respects; but enough appears upon its face to shew that the law was substantially complied with, except in one particular; the justices do not certify that the deed was fully explained to the *feme*, nor is there anything in the certificate from which, in my opinion, we are authorized to infer that at the time of the acknowledgment of the deed she had knowledge of its contents."

This act of 1814 was the first act passed by the Legislature of Virginia prescribing a form of certificate of acknowledgment of a deed by married women, and no substantial change has been made in that form from that day to this.

By this form she is required to acknowledge the deed, after it has been fully explained to her, "to be her act and deed," and to *declare* "that she had willingly signed, sealed and delivered the same, and that she wished not to retract it." Mrs. Randolph, it will be seen, did not acknowledge the deed to be her *act* and *deed*, but "acknowledged that she had willingly executed the said deed on her part, and wished not to retract it." She omitted the *declaration* required altogether. And, yet, the Court of Appeals decided that the certificate, as far as it went, was a substantial compliance with the Statute, and that if it had stated that the deed mentioned in it had been fully explained to Mrs. Randolph, it would in all

respects, have been a substantial compliance with the requirements of the Statute, and her deed would have been valid and binding on her.

And here let it be observed, that in this, the very first case decided under the Act of 1814, prescribing a form of acknowledgment by married women, of their deeds conveying their interest in real estate, the Court sanctioned a wider departure from the requisitions of the Statute, than had ever occurred before. The natural inference, as it seems to us, was, that when the legislature did, what they had never done before, and gave a form of acknowledgment of their deeds by married women, it was intended that the courts should hold them to a more strict compliance with the terms of the Statute, than before. But the courts of Virginia adopted the opposite course. And while they were compelled to hold the certificate *bad*, because it failed to show "that the deed was fully explained to the wife," they took special pains to show that this was the *only* ground upon which they held it *bad*.

This statute of 1814 was, in substance, re-enacted in 1819, with the same form of certificate of acknowledgment as that prescribed by the act of 1814. It is found in Vol. 1 of the Revised Code of Virginia of 1819, chapter 99, sec. 15, and is as follows:

"15. When husband and wife have sealed and delivered a writing, purporting to be conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, shall declare to him, that she did freely and willingly seal and deliver the said writing, to be then shewn and explained to her, and wishes not to retract it, and shall, before the said court, acknowledge the said writing, so again shewn to her, to be her act, such privy examination, acknowledgment and declaration shall be thereupon entered of record in such court; and if, before any two justices of the peace for any county or corporation, in 'any State' or territory of the *United States*; 'or of the district of *Columbia*.' Such married woman being examined privily and apart from her husband, and having the writing aforesaid fully explained to her, shall acknowledge the same to be her act and deed, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, and such privy examination, acknowledgment and declaration shall be certified by such justices under

their hands and seals, by a certificate annexed to the said writing, and to the following effect, that is to say:

"———County or Corporation, &c:

We A. B. and C. D. justices of the peace in the county (or corporation) aforesaid in the State (or territory or district) of ———, do hereby certify that E. F. the wife of G. H. parties to a certain deed bearing date on the —— day of ——— and hereunto annexed, personally appeared before us, in our county (or corporation) aforesaid; and, being examined by us, privily and apart from her husband, and having the deed aforesaid fully explained to her, she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. Given under our hands and seals, this —— day of ———

A. B. (Seal.)
C. D. (Seal.)"

The balance of the section provides for the recording of the deed, and its effect to convey all the interests of the wife in the lands thereby conveyed.

The case of *McClanachan et al.* v. *Siter, Price & Co.*, 2 Gratton, 280, was the first case decided under this statute. It was decided in 1845. In this case Mrs. Virginia A. Gantt, wife of John Gantt, was the owner in fee of 250 acres of land in Greenbrier county, Virginia, and on the 3d day of March, 1831, she united with her husband in a deed of conveyance of a portion of said land to George H. Kenerly, for the uses and purposes therein mentioned. The deed was acknowledged by Gantt and wife before two justices of the peace in the state of Missouri, where Gantt and his wife then resided. In the statement of the case on page 283 of the report it is said: "The certificate made by the Missouri justices of the execution of the deed states that John Gantt and his wife executed and acknowledged the deed in their presence, and they go on to say: 'She, the said Virginia A., having been by us first *made acquainted with the contents* of said deed, and examined *separately and out of the hearing* of her said husband, whether she executed the same freely and voluntarily, and without any compulsion or under influence of her said husband or fear of his displeasure she acknowledged that she executed said deed freely and voluntarily, and without any

compulsion or influence of her said husband, and that she does not wish to retract it."

This certificate was held by the court below, to be a sufficient compliance with the statute, and the deed was held valid. And Mrs. McClanachan and N. B. Gantt appealed.

Judge Allen, one of the then judges of the Court of Appeals, decided the case in the court below, and did not, therefore, sit on the hearing in the Court of Appeals. See note at the bottom of page 280 of the report. And he was the same Judge Allen who decided the case of *Hairston* v. *Randolph*. In this certificate, but little attention seems to have been paid to the *words* of the form prescribed by the statute, by the justices who certified the wife's acknowledgment of the deed. Instead of certifying that Mrs. Gantt, being examined by them "privily and apart from her husband," and having the deed "fully explained to her," they say. "She, the said Virginia A. having been by us first *made acquainted with the contents* of said deed, and examined *separately and out of the hearing* of her husband, whether she executed the same freely and voluntarily, and without any compulsion or under influence of her said husband or fear of his displeasure." And instead of the words. "She the said E. F. (Virginia A. Gantt) acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same," they say: "She acknowledged that she executed the said deed freely and voluntarily, and without any compulsion or influence of her said husband, and that she does not wish to retract it." And she made no *declaration*, whatever. And still Judge Allen, in the court below, and the court above on appeal, held the deed to be good, and the certificate sufficient. And so firmly had this liberal construction of the statutes of the commonwealth, and of the certificates of the acknowledgment of their deeds under them, by married women in order to support their deeds, been settled and determined by the courts of Virginia, that both the counsel of parties, and the Court of Appeals of the state, disposed of the case in very few words, and affirmed the decision of Judge Allen, in the court below, as to the sufficiency of the certificate of acknowledgment. There were other important questions in the case,

upon which the decree was reversed, Stanard, Judge, dissented, without giving an opinion. But his dissent could not have been as to the sufficiency of the acknowledgment, as he concurred in the opinion of Judge Allen in *Hairston* v. *Randolphs.*

Grove v. *Zumbro*, 14 Gratton, 501, was the last case decided in Virginia, before West Virginia became a state. The deed in question in this case was acknowledged before a Tennesee court, under the act of 1819 and the certificate of its acknowledgment by the wife, is found on page 516 of the report, and is as follows:

"The State of Tennessee, Rutherford Circuit Court, October Term, 1833. The within deed of conveyance was presented in open court, and acknowledged by the said John Zumbro to be his act and deed for the purpose therein contained. The court thereupon proceeded to take the privy examination of the said Mary Zumbro, wife of the said John Zumbro, separate and apart from her said husband, who acknowledged that she executed said conveyance, freely and voluntarily, and without any fear, pursuasion or coercion of her said husband. All which was, on motion, ordered to be certified. In testimony whereof," &c.

The wife did not *declare* "that she *wished not to retract* what she had done;" nor was there anything in the certificate tending "to show that she made any such declaration." And for this reason *alone* the certificate was held to be "fatally defective." But they found no other fault in it.

Although the act of 1819, like that of 1814, required the wife *to acknowledge* the deed "*to be her act and deed*" and to *declare* "*that she had willing signed, sealed and delivered the same, and that she wished not to retract it.*"

In 1849 there was a general revision of the laws of Virginia, and a new Code was adopted and published, known as the "Code of Virginia of 1849." Chapter 121, section 4, of this Code made a slight change in the law regulating the acknowledgment of deeds by married women, and the form of the certificate of such acknowledgment prescribed by it. Like the former statutes on the subject, it required the certifi-

cate to be "to the following effect." Then follows the form prescribed, and after naming the several officers who may take and certify the acknowledgment, it certifies that the wife, "*being examined by me* (or us) *privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said E. F. acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.*"

The change in the form prescribed by this act from that prescribed by the act of 1819, it will be seen, was: (1) The act of 1819 required the wife to acknowledge the writing "to be her act and deed," while that of 1849 required her to acknowledge the writing "to be her act," omitting the words "and deed," and (2) the act of 1819 required her to *declare* "that she willingly *signed, sealed and delivered* the same, and that she wished not to retract it," while that of 1849 required her to *declare* "that she had willingly *executed* the same, and does not wish to retract it" (italics ours). And the words "declared that she had willingly signed, sealed and delivered the same" in the act of 1819 were taken from the form prescribed by the act of 1814.

And this chapter 121 of the Code of 1849, was in force on the 20th day of June, 1863, when West Virginia became a State. And the attention of the court is here called to the following provisions of the Constitution of West Virginia whichtook effect on the day last named.

Article XI, Section 8, of that Constitution provided as follows:

"Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature."

The County Court as it existed in Virginia at the time of the adoption of that Constitution was abolished, and by Section 5, of Article VII, of that Constitution, the people were

required to elect a Recorder. And Section 6 of said Article prescribed his duties, as follows:

"The Recorder, in addition to the duties incident to the recording of inventories and other papers relating to estates, and of deeds and other writings, the registering of births, marriages and deaths, and the issuing of marriage licenses, shall have authority, under such regulations as may be prescribed by law, to receive proof of wills and admit them to probate, to appoint and qualify personal representatives, guardians, committees and curators, to administer oaths, take acknowledgments of deeds and other writings, and relinquishments of dower."

And the first act passed by the Legislature of West Virginia was "in relation to the powers and duties of the Recorder," and among other things it provided as follows: "The Recorder of every county shall have the same powers and perform the same duties, in relation to receiving the acknowledgment or proof of, admitting to record, recording, listing and certifying deeds * * * * as the clerk of the county court of such county had or was liable to perform under the laws of Virginia, in force within the limits of this state on the 19th day of June, 1863." This law was in force until the adoption of the new constitution of West Virginia in 1872, when the office of Recorder was abolished. The deed of Mrs. Pennybacker, in question in this case, was acknowledged before the Recorder of the said county of Cabell, as will be seen hereafter.

In 1868 a code of laws was enacted and published for the state of West Virginia. And chapter LXXIII., sec. 4, of this Code provided as follows:

"When a husband and his wife have signed a writing purporting to convey real estate, she may appear before a recorder authorized to admit such writing to record in his office; and if, on being examined privily and apart from her husband by such recorder, and having such writing fully explained to her, she acknowledge the same to be her act, and declare that she had willingly executed the same, and does not wish to retract it, such privy examination, acknowledgment and declaration shall then be recorded by such recorder in his office; or she may appear before a justice, notary public, re-

S.G.

DEPARTMENT OF JUSTICE,

In correspondence on this subject quote the above initials and file number.

WASHINGTON, D. C.

July 1, 1897.

Mr. Luther E. Hewitt,
219 South 6th St.,
Philadelphia, Pa.

Sir:

Your letter of the 21st ultimo, requesting copies of records and briefs in the cases of Sherman v. Robertson (138 U.S., 570) and In re Belt, (159 U.S., 95), duly received.

Neither record nor brief was printed in the former case, as you will see by reference to the report of the case. In the Belt case the Department has only its library file copy of the petition. The motion for leave to file the petition was denied by the court. If you will write to Mr. George Kearney, counsel for the petitioner he may be able to comply with your request for a copy of the petition. I believe his address is care of Congressional Library, this city.

Respectfully,

Holmes Conrad

Solicitor General.

corder, prothonotary, or clerk of any court within the United States, or a commissioner appointed within the [illegible] governor of this state, and such justice, notary [illegible] corder, prothonotary, clerk or commissioner may [illegible] her; and if, after such explanation, she [illegible] edgment and declaration, shall certify the same on or annexed to the said writing, to the following effect, to wit:"

And the *form* of the certificate of acknowledgment by the wife, which follows, is precisely the same as in the Code of 1849. By it the officer taking the acknowledgment of the wife is required to certify that the wife personally appeared before him in his county, "and being examined by" him "privily and apart from her husband, and having the said writing fully explained to her, she, the said ——— ———, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it." And this was the law in force in West Virginia, when the deed in question in this case was executed and acknowledged by Mrs. Pennybacker.

It is a well established rule of law, that where a state adopts a statute of another state or country, it also adopts the judicial construction of that statute in the state or country from which it was taken, up to the time of its adoption.

The usual way of adopting a statute of one state by another, is by a legislative enactment, but here the statute of the State of Virginia in relation to the acknowledgment of deeds conveying their real estate, by married women, contained in Code of 1849, of that State, above alluded to, was adopted first by the people of the State of West Virginia, in their sovereign capacity, in the most solemn form by which they could have adopted it, and then by the Legislature of West Virginia, as stated above. And both adopted with it, the judicial construction of the statute alluded to, in the Code of 1849, and the statutes on the same subject which preceded it, in the State of Virginia, up to the time that constitution took effect. And this law, with its construction by the courts of Virginia, we confidently submit, *every* court in West Virginia was *bound* to obey.

There are but two reported cases in West Virginia in rela-

tion to the acknowledgment of a deed by a married woman prior to the 25th of February, 1870, the day on which the deed of Mrs. Pennybacker and her husband to Mr. Huntington for the land in question was executed and acknowledged by them. *Bartlett* v. *Fleming*, 3 West Virginia, 163, is the first of these cases. The certificate of the acknowledgment of the wife was fatally defective, and so held by the court. It is found on the first page of the case. The husband and wife both acknowledged the deed at the same time, and in the presence of each other. And the wife, when examined by the justices, made no declaration, but simply desired the justices to certify the said acknowledgment to the clerk of the county court, in order that the deed might be recorded. And the deed was at no time explained to the wife. The deed in question was executed in Virginia in 1858.

Wise v. *Postlewait et al.*, 3. W. Va. 452, was the other case alluded to. This case arose under the act of 1792, and is badly reported. There were quite a number of deeds in question in the case, and to several of them married women were parties. The defendants objected to the reading of these deeds in evidence by the plaintiff, but the objections were overruled by the court and the deeds were read. One of these deeds was from Henry Barrackman and wife to William Postlewait, and the certificate of its acknowledgment was as follows: "At a Circuit Court held for Monongalia county, September term, 1809, this deed from Henry Barrackman and Abagail, his wife, to William Postlewait, was produced in court and acknowledged by the said Henry and Abagail, his wife, and is ordered to be recorded, the said Abagail being first privately examined as the law directs, and assenting thereto. Teste: N. Evans, C. M. C." A verdict and judgment were given for the plaintiff, and the Court of Appeals affirmed the judgment on writ of error.

On February 25, 1870, when Mrs. Pennybacker's deed to C. P. Huntington for the land in question was executed and acknowledged by her, this settled, uniform and long-continued construction of the statutes of Virginia, regulating the acknowledgment of deeds by married women, conveying their

interest in real estate, had become a rule of property which no court had a right to change after that date, as to past transactions. And if the execution and acknowledgment of that deed by Mrs. Pennybacker was, by the decision of the courts referred to, a substantial compliance with the requisitions of the statute of Virginia and West Virginia, then in force, under which the deed was executed and acknowledged, as we propose to show that it was, then Mr. Huntington acquired a good and valid title to the land in question, under that deed.

After the execution and acknowledgment of that deed, quite a number of cases were decided by the Supreme Court of Appeals of West Virginia, ending with the case of *Pickens* v. *Knisely*, 29 W. Va. 1, involving the validity of the certificate of acknowledgment of their deeds by married women, in which no change in the construction of the statutes of either state regulating the acknowledgment of deeds by married women was made. The certificate of the acknowledgment of the deed in question, in every case, except *Pickens* v. *Knisely*, was fatally defective, and were so held by the court. And in that case the court below held the certificate *bad* and dismissed the bill. And *Pickens* appealed. The certificate of the acknowledgment of the deed in question by Mrs. Knisely, was as follows:

"*West Virginia, Barbour county, to wit:*

"I *Mikel* Simon, justice of Union Township, in the county aforesaid, do certify, that Sarah Jane Knisely, the wife of the above named L. M. Knisely, personally appeared before me in my township and being examined by me privily and apart from her husband and having the above deed of trust *date* December the 15th, 1868, fully explained to her, she, the said Sarah Jane Knisely, acknowledged the said *writing* to be her act and declared, that she had willingly acknowledged the same and did *not* wish to retract it. Given under my hand this 18th day of December, 1868.

MICHAEL SIMON, Justice."

This deed was executed and acknowledged under the Code of Virginia, of 1849. By Section 4, of chapter 121, of that code, a married woman was as we have seen, required to "*declare* that she had willingly *executed* (not acknowledged) the

same, and does not wish to retract it." (Italics ours.) The Court of Appeals held the certificate *good*, and reversed the decree of the court below. The Judges of the Supreme Court of Appeals of West Virginia who decided this case, also decided the case of *Blair* v. *Sayre*, 29 W. Va. 604, noticed further on. And the same Judge gave the opinion of the court in both cases. And we call the attention of this Honorable Court, to the opinion of *that* Honorable Court, on page 7 of the case, in order that the labor of *that* court to hold this certificate *good*, may be seen and appreciated. The court say: "The Justice certifies, that he has examined Mrs. Knisely separately and apart from her husband; that during such privy examination he fully explained to her the said writing, that she then acknowledged the same, that she then declared, that she *had* willingly *acknowledged* the same, and that she did not wish to retract it." When it said she *had* willingly *acknowledged* the same, it seems to us, taking the whole certificate together, it was not meant, that she had during the privy examination then being had 'willingly acknowledged the deed,' there would be no meaning in that. It was not the duty of the justice to ask her, whether she was willingly then acknowledging the paper, or whether she was willingly then declaring, that she had 'willingly' executed the same, and did not then wish to retract it. If you give the certificate the construction contended for by the counsel for the appellee, we would have to hold, that during her examination separate and apart from her husband she acknowledged the deed and declared, that she willingly then acknowledged it, and "she did not wish to retract the acknowledgment thus willingly made. What was it she declared that she did not wish to retract? Certainly the execution of the deed. And when she declared that 'she had willingly acknowledged the deed' she meant that she had willingly executed it; that is, she declared that she had willingly signed and sealed the deed free from the control of her husband, and that *act* she did not wish to retract. This is the true sense and construction of the instrument; and it would be technical indeed to hold that this was not a substantial compliance with the statutory requirement."

We concur in the *conclusion* to which that Honorable Court

arrived in that case, but we most respectfully dissent from the reasoning by which that conclusion was reached.

And the remarkable thing about this case is, that our Court of Appeals seem to have been oblivious of the fact that the Court of Appeals of Virginia had ever passed upon the question of the validity of the certificates of the acknowledgment by married women, of their deeds conveying real estate. And instead of looking to the proper source of information, they went to Alabama and Pennsylvania for authority to sustain their rulings in the case before them.

Blair v. *Sayer*, 29 West Va. 604.

This is the first case in which the Supreme Court of Appeals of West Virginia took the responsibility of changing the settled construction by the Courts of Virginia, of the statutes of that state, regulating the acknowledgment of deeds by married women, prior to June 20, 1863, and by the courts of West Virginia prior to the decision of this case.

The question as to the sufficiency of the acknowledgment of the deed in question in this case, by Mrs. Blair, was not raised on the trial of the case in the court below. And the plaintiffs did not seek a recovery of the land in question by reason of any defect in that certificate. Record pp. 605 to 609.

And the court decided that there was error in the judgment of the court below to the prejudice of the plaintiffs, and reversed the judgment and remanded the case for a new trial, without any reference to the certificate of the acknowledgment of the deed by Mrs. Blair. Record p. 609.

After this decision by the Court, it seems to us that they should have stopped there, and left the question of the sufficiency of the certificate, then for the first time raised in the case, until it came properly before them for their decision.

That part of the certificate which the court held to be defective, is found on p. 610 of the case, as follows:

"I further certify, that Nancy J. Blair, wife of the said E. F. Blair, being examined by me privily and apart from her said husband and having the writing aforesaid fully explained to her, she, the said Nancy J. Blair, *acknowledged*, that she had willingly executed the same and does not wish to retract it."

The court then cite a list of authorities furnished them to show "that the certificate in question is a substantial compliance with the statutory requirements." Record p. 610.

Among the cases here cited, were *Langhorne* v. *Hobson* and *Todd* v. *Baylor*, hereinbefore discussed, and the court approves of both of these cases.

But they utterly repudiated the case of *McClanachan* v. *Siter, Price & Co.*, and they exhausted more than a page of their opinion in showing *to their own satisfaction, at least*, that the court decided this case in ignorance of the real questions involved in it. And they solemnly decided "that the point relied on as having been decided in 2d Grattan was in no way brought to the attention of the court and was therefore not passed upon in such a way as to make the decision a rule of law."

This would seem rather hard on the very able and experienced judges who sat in the decision of that case, both in the court below and in the court above.

The judges of the Court of Appeals of Virginia during the time the cases reported in 2nd Grattan were decided, were *William H. Cabell, President; Francis T. Brooke, Robert Stanard, John J. Allen* and *Brisco G. Baldwin.*

Judge Allen decided the case in the Circuit Court, and therefore did not sit in the hearing of the case in the Court of Appeals. See note at the foot of p. 280, of the case.

He was the same Judge *Allen* who gave the opinion in *Hairston* v. *Randolph*, before referred to, and Judges *Cabell* and *Stanard*, and we suppose *Brooke* also, sat with him in that case, as there is nothing said of his being absent. And Judges *Cabell* and *Brooke* sat with Judge *Tucker* in the case of *Tod* v. *Baylor.*

In 1841, Judge *Tucker* resigned his office as Judge of the Court of Appeals, and on the 20th of January, 1842, Judge *Baldwin* who gave the opinion of the court in *McClanachan* v. *Siter, Price & Co.*, was appointed to fill the vacancy thus created in the Court of Appeals. In those days all Judges in Virginia were elected by the Legislature for life on account of their known fitness for the office, regardless of political con-

siderations, and Judges *Hansard*, *Allen*, and *Baldwin* were all members of the minority party in Virginia.

And we think it safe to say "that the point relied on as having been decided in 2nd Grattan," was "brought to the attention of the court," and *was* "passed upon in such a way as to make the decision a rule of law." The opinion of the Supreme Court of Appeals of West Virginia to the contrary, notwithstanding.

Laidley v. *Land Co.*, 80 West Va. 505.

This is the title of the case now before this Honorable Court on a writ of error to the Supreme Court of Appeals of West Virginia. And an examination of the case discloses the fact that the only precedent for its decision, was the case of *Blair* v. *Sayer*, set by the Judges of that court, themselves, which case was decided by that court in defiance of *all* precedents. Judge Snyder, however, says in his opinion in that case (Record 515). "There are two decisions by this Court, made prior to that of *Blair* v. *Sayer*, which in my judgment, decided the very question involved in that case, and were therefore binding authorities for the decision in that case. They are *McMullen* v. *Eagan*, 21 W. Va. 233, and *Laidley* v. *Knight*, 28 W. Va. 735."

The constitution of West Virginia Art VIII, Sec. 5. provides, as follows:

"When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case."

And in West Virginia we look to the syllabus of the case for the points decided, and not to the reasoning of the court. Point 1 of the syllabus in *McMullen* v. *Eagan*, reads thus:

"1. If the certificate of the acknowledgment of a deed by a married woman living with her husband shows, that she and her husband jointly acknowledged the deed before a

proper officer, such deed is inoperative to convey her interest, though the certificate shows, that she was after such acknowledgment examined privily and apart from her husband by the officer, and had the deed fully explained to her and declared that she had willingly executed the same and did not wish to retract it."

In *Laidley* v. *Knight*, 23 W. Va. 735, there are 8 points in the syllabus, and they are all substantially the same, and point 1, is all that is necessary to show the decision of the court. It is as follows:

"1. If the certificate of the acknowledgment of a married woman living with her husband shows, that she and her husband *together* acknowledged the deed before a proper officer, and *does not show, that while she was being examined privily and apart from her husband, and after the deed had been fully explained to her*, she acknowledged the deed before such officer, such deed is inoperative to convey her title to the lands therein mentioned, although the certificate shows that all the other requirements of the statute in that case made and provided had been fully complied with."

And now, with all due respect to his Honor, Judge Snyder, we must be permitted to say that these cases afforded no authority whatever for the decision of the case of *Blair* v. *Sayer*.

The object of the statutes regulating the acknowledgment of deeds by married women was to protect them against fraud, imposition and coercion. And if, under these statutes a man could get his wife to put her name to a deed to real estate, and then have her acknowledge the deed as her act in his presence, jointly with him, and then step aside and have her privily examined by a Justice or Notary, after an explanation of the contents of the deed, real or pretended, and then have her *declare* that she "had willingly executed the same, and wished not to retract it," the object and purpose of the privy examination and explanation would have been completely nullified, and the proceeding, simply, a mockery of justice.

The acknowledgment of the deed and the declaration were both required to *follow* the privy examination and explanation.

The date of the certificate of acknowledgment of Mrs. Ea-

gan, of her deed in the case of *McMullen* v. *Regan*, was October 30, 1872. [illegible] years after the date of the deed of Mrs. Pennybacker to U. P. Huntington, for the land in question. And the date of the acknowledgment of the deed of Mrs. M. Rowena Laidley, in the case of *Laidley* v. *Knight*, was August 27, 1878, 8 years after the date of Mrs. Pennybacker's acknowledgment of her said deed to Mr. Huntington.

So that if the decisions of those cases had been a sufficient authority for the decision of *Blair* v. *Sayer*, none of these decisions could have affected the validity of the deed of Mrs. Pennybacker to Mr. Huntington, executed and acknowledged by her and her husband in the year 1870, and before the decision of any of the cases above referred to, in our view of the acknowledgment of that deed.

The certificate of the acknowledgment of her said deed to Mr. Huntington, is as follows:

"STATE OF WEST VIRGINIA,
County of Cabell,

"Personally came before me, the undersigned, recorder of the county and State aforesaid, Sarah H. G. Pennybacker, wife of the above mentioned John Pennybacker and party to the foregoing deed, and, being examined by me privily and apart from her husband and having the deed aforesaid fully explained to her, she, the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed, and delivered the same and wished not to retract it.

"Given under my hand and seal this 25th of February, 1870.

"THO. J. HAYSELP, *Recorder*, [Seal.]"

As will be seen, the recorder certifies, (1) That Mrs. Pennybacker personally appeared before him and was examined by him privily and apart from her husband, (2) That during said privy examination the said deed was "fully explained to her," and (3) That "she, the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed, and delivered the same and wished not to retract it." She did not, in so many words, *acknowledge* the writing "to be her act and deed." But she did, what we maintain was the equivalent of both the *acknowledgment* and the *declaration*, prescribed by the statutes of Virginia prior to June 20, 1863, as said statutes

had been uniformly construed by the courts of Virginia prior to that date, and by the courts of West Virginia from that date, to the date of the decision of *Blair* v. *Sayer*, a period of 24 years. And now, in order to test the sufficiency of the certificate of the acknowledgment by Mrs. Pennybacker, of her deed to Mr. Huntington for the land in question, we propose to institute a comparison between the certificate, which the Supreme Court of Appeals of West Virginia held was fatally defective; and the certificates of the acknowledgment of *their* deeds, by the married women in the cases referred to, decided by the Court of Appeals of Virginia to be *good* and *binding* on them. And also between that certificate and the certificates in the cases decided by the Supreme Court of Appeals of West Virginia in the same way. And we will begin this comparison with the certificate of the acknowledgment by Mrs. Baylor of the deed in question in *Tod* v. *Baylor*, 4 Leigh, 498, which is as follows:

"We have on this 10th of August, 1802, personally gone to *Mrs. Anne Baylor*, and exemined her privily and apart from her said husband—who makes to us her acknowledgment of the conveyance of 320 acres of land contained in the indenture hereto annexed, freely and voluntarily, without the threats or persuasions of her husband, and that she is willing the same shall be recorded in the county court of Caroline."

She does not acknowledge the deed to be her act and deed, nor does she *declare* that she had willingly *signed* and *sealed* the deed as prescribed by the statue. And like the certificate of the acknowledgment of Mrs. Pennybacker, of her deed in question, the commissioners failed to certify that she declared anything. And yet, the Court of Appeals of Virginia, composed of Judges of long years of experience and of national reputation, held this certificate to be good, notwithstanding this failure. While the Supreme Court of Appeals of West Virginia, held the certificate of the acknowledgment by Mrs. Pennybacker, of her deed to Mr. Huntington, *bad*, and her deed *void*, for this same identical failure.

Hairston v. *Randolphs*, 12 Leigh. 445, comes next in order. As already stated, this was the first reported case decided under the Act of 1814, which Act prescribed a form of certifi-

cate of acknowledgment. The deed of the wife in question in this case was executed in 1793, but was not acknowledged by the wife until February 20, 1818, when the Act of 1814 was in force. The form prescribed by this Statute, after the privy examination of the wife, and the explanation of the deed to her, reads, "she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it."

The certificate of the acknowledgment by Mrs. Randolph, as to same matter, reads, "and acknowledged that she had willingly executed the said deed on her part, and wished not to retract it."

And this was all the acknowledgment or declaration Mrs. Randolph made, as to her deed in question, in that suit. She did *not* as the form prescribed *acknowledge* the deed "to be her act and deed," nor did she *declare* "that she had willingly signed, sealed and delivered the same." In fact she failed to make any declaration whatever. And yet as we have seen, the Court of Appeals of Virginia unanimously decided that the certificate of the acknowledgment by Mrs. Randolph of her said deed, was as to that matter, a substantial compliance with requirements of the Statute. But as we have seen, the court held the certificate *bad* for the *sole* reason that the deed was not explained to the wife. And thus, in the very first reported case under the Act of 1814, by which a form of certificate the same, substantially as now, the court sanctioned the same departure from the form prescribed, and held the certificate *good*, which the Court of Appeals of West Virginia, in *Blair* v. *Sayer*, and in the case we have in hand, have refused to sanction, and held the deeds *bad*.

McClanachan v. *Siter, Price & Co.*, 2nd Grattan 280, is the next case to which we wish to call attention in the way of comparison. This case was decided in 1845, when the statute of 1819, was in force, and which prescribed the precise same form of certificate of acknowledgment of their deeds, by married women, as that contained in the act of 1814.

This form, leaving off the introductory part, read thus:

"And *being examined by us privily and apart from her husband* and *having the deed aforesaid fully explained to her*, she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it." Given under our hands and *seals, etc.*

The certificate of the acknowledgment by the wife of John Gantt, of the deed in question in this case, as to her privy examination, acknowledgment and declaration, reads as follows:

"She the said Virginia A. having been by us first *made acquainted with the contents* of said deed, and examined *separately and out of the hearing* of her said husband, whether she executed the same freely and voluntarily, and without any compulsion or under influence of her said husband or fear of his displeasure, she acknowledged that she executed said deed freely and voluntarily, and without any compulsion or influence of her said husband, and that she does not wish to retract it," &c.

This deed was acknowledged in 1831, when the act of 1819, was in force, and the sufficiency of its acknowledgment by the wife, was, of course, governed by that act. Like Mrs. Pennybacker, she failed to *acknowledge* her deed, as her act, or her act and deed, as the statute then prescribed, and like Mrs. Pennybacker, she failed to *declare* that she had willingly signed, sealed and delivered the deed, and did not wish to retract it; and like Mrs. Pennybacker, she failed to *declare* anything. But instead of these requirements of the statute, like Mrs. Pennybacker, she "*acknowledged* that she executed said deed freely and voluntarily, and without any compulsion or influence of her said husband, and that she does not wish to retract it."

Mrs. Pennybacker, in lieu of the requirements of the statute "*acknowledged* that she had willingly signed, sealed and delivered the same (the deed) and wished not to retract it."

Grove v. *Zumbro*, affords another apt illustration in this comparison. The certificate of the acknowledgment by the wife of John Zumbro, of the deed in question in that case, reads thus:

"The court thereupon proceeded to take the privy examination of the said Mary Zumbro, the wife of the said John Zumbro. Separate and apart from her said husband, she acknowledged that she executed said conveyance freely and voluntarily, and without any fear, persuasion or coercion of her said husband."

She did not, as the Statute of 1819, required, acknowledge the deed to be "her act and deed," nor did she *declare*, that she had "willingly signed, sealed and delivered the same." In fact, she made no declaration at all.

And yet, it is apparent from the opinion of the court, delivered by Judge Moncure, in that case, that if Mrs. Zumbro had added to her said acknowledgment the words, "and that she wished not to retract it," the certificate would have been held sufficient by the court, as the equivalent of both the *acknowledgment* and the *declaration* required by the statute, as had been held in the cases in the court which preceded that case.

Wise v. *Postlewait*, is the last case to which we propose to call attention in this connection. That case arose under the Act of 1792. The deed in question in this case was acknowledged by the wife before a court in Monongalia, Virginia, in 1809. The Statute of 1792, provided as follows:

"When husband and wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in any court, and being examined privily and apart from her husband, by one of the Judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing to be then shown and explained to her and wishes not to retract it, and shall before said court acknowledge the said writing again shown to her to be her act," such declaration and acknowledgment was declared by said act to be sufficient. The deed was acknowledged by the husband and wife before the Circuit Court of Monongolia county, and the certificate of that acknowledgment entered of record in said court was as follows:

"At a Circuit Court held for Monongolia county, September term, 1809, this deed from Henry Barrackman and Abigail, his wife, to William Postlewait, was produced in court

and acknowledged by the said Henry and Abigail, his wife and is ordered to be recorded. She the said Abigail being first privately examined as the law directs and assenting thereto. Teste; N. Evans, C. M. C."

The court sustained the deed so acknowledged, and affirmed the judgment of the court below. This case was decided by the Supreme Court of Appeals of West Virginia in January, 1869.

The Judges of the court who decided the case, were those first elected in West Virginia, and were leading lawyers in Virginia prior to June, 1863. But between the time this case was decided, and the time of the decision of *Blair* v. *Sayer*, a political revolution had occurred in West Virginia, and new Judges filled the seats of those first elected.

The certificate of the acknowledgment of the deed in this case by Mrs. Barrackman ignored the language of the statute entirely, except as to her privy examination, and the court held it sufficient, notwithstanding. She failed to *acknowledge* the deed "to be her act," and she failed to *declare* "that she did freely and willingly seal and deliver the said writing," &c.

The certificate of the acknowledgment by Mrs. Pennybacker, of her deed in question in the case now before this Honorable Court, does not, as we have seen, follow the language of the statute. After her privy examination, and the explanation of the deed to her, it reads thus: "She, the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed and delivered the same (the deed) and wished not to retract it."

Mrs. Pennybacker did not, in so many words *aeknowledge* the writing "to be her act," nor did she *declare* "that she had willingly executed the same," as in the form prescribed by the statute. But she did, what we very confidently submit, was the equivalent of both the *acknowledgment* and the *declaration* as prescribed by the statute.

She "acknowledged that she had willingly signed, sealed and delivered the same, and wished not to retract it."

A deed is a writing signed, sealed and delivered and until it is delivered it is *no* deed. And by her acknowledgment, Mrs. Pennybacker did *more* than she was required to do by the

statute. And in this connection we desire to refer again to the acknowledgment of Mrs. Gantt of her deed in the case of *McClanachan* v. *Siter, Price and Co.* The statute of [illegible] force when this deed was acknowledged, required wife, upon her privy examination and the explanation of the deed to her to do two things. (1) To *acknowledge* the "writing to be her act and deed." (2) To *declare* "that she had willingly signed, sealed and delivered the same, and did not wish to retract it." But she did neither the one nor the other. But in place of these statute requirements, Mrs. Gantt "acknowledged that she executed the said deed freely and voluntarily, and without any compulsion or influence of her said husband, and that she does not wish to retract it."

And now we very confidently submit that if this acknowledgment of Mrs. Gantt that she *executed* her said deed freely and voluntarily, and without any compulsion or influence of her husband, was the equivalent of the requirements of the statute that she should acknowledge the writing to be her act and deed, and declare that she had willingly signed, sealed and delivered the same; then the acknowledgment of Mrs. Pennybacker that she had willingly signed, sealed and delivered *her* deed, was the equivalent of the requirements of the statute then in force, that she should *acknowledge* the deed "to be her act," and declare that she had willingly *executed* the same, &c. And this is not the only case where this same thing occurs, as will be seen by reference to the other cases herein referred to.

But the Supreme Court of Appeals of West Virginia, repudiated all these decisions and following the sole precedent set by themselves in *Blair* v. *Sayre*, and which was the only precedent they could find, held the certificate of acknowledgment by Mrs. Pennybacker, of her deed to Mr. Huntington to be insufficient and her deed to be void.

The case of *Blair* v. *Sayer*, was decided April 9, 1887, and *Laidley* v. *Land Co.*, on November 26, 1887, before the case of *Blair* v. *Sayer*, found its way into the West Virginia Reports. And by reason of these decisions, the bar of West Virginia procured a bill to be introduced into the Legislature at their then next session to repeal the law in relation to the privy examination, and acknowledgment of their deeds, by mar-

ried women, and allowing them to acknowledge their deeds, as if they were unmarried. The bill passed one House, but failed in the other, for want of time. And at the next session of the legislature the bill was again introduced, and passed both Houses and became a law.

And now we respectfully submit; that by reason of the uniform construction of the statutes of Virginia and West Virginia regulating the acknowledgment of deeds conveying real estate by married women, by the courts of both States for well nigh a century, the certificate of the Recorder of the acknowledgment by Mrs. Pennybacker of her deed to Mr. Huntington for the land in question was a substantial compliance with requirements of the statute in force in West Virginia at the date of said certificate regulating such acknowledgments and that her said deed is, therefore, good and valid in law, and the title of the plaintiff in error to said land and premises is also good and valid in law.

And we maintain that by the *change* of the construction of the statutes in question by the Supreme Court of Appeals of West Virginia, in the case of *Blair* v. *Sayre*, and in the case of *Laidley* v. *Land Co.*, whereby said deed was declared void, raises a federal question of which this Honorable Court has jurisdiction.

The question as to the effect of a change in the judicial construction of a statute upon rights previously acquired under it, has been passed upon and settled by this Honorable Court, in the following cases:

Douglass v. *County of Pike*, 101 U. S. 677.
Gelpcke v. *Dubuque*, 1 Wallace, 175.
Chicago v. *Shelden*, 9 Wallace 50.
Alcot v. *Supervisors*, 16 Wallace, 678.
Chicago Life Insurance Co. v. *Needles*, 113 U. S. 574.
Anderson v. *Santa Anna*, 116 U. S. 356.

In *Douglass* v. *County of Pike*, this Honorable Court, speaking through Chief Justice Waite, says: "The true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative

amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decisions is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of legislative enactment."

This rule of law so clearly and forcibly laid down by this Honorable Court, it seems to us, must be conclusive of this case.

While this case has been pending in this Honorable Court, two motions have been made to dismiss it for want of jurisdiction, which have been overruled for the time being. And the same grounds relied on for its dismissal, on those motions, will, we suppose, be relied on in the argument of the case.

It was contended that if there was a *federal* question involved in the decision of this case, in the state courts, it was not raised in the proper time to avail the plaintiff in error; that the proper time to have raised this question was when this case was before the Supreme Court of Appeals of West Virginia upon the writ of error and *supersedeas* sued out by Laidley, the plaintiff below, to the judgment of the Circuit Court of Cabell county in favor of The Central Land Company of West Virginia, defendant below, which they claimed was not done.

It is a sufficient answer, we submit, to that contention, that the verdict of the jury and the judgment of the court below, were for the defendant, The Central Land Company of West Virginia; the court holding as the courts of Virginia had always done, that the certificate of the acknowledgment by Mrs. Pennybacker of her deed to Mr. Huntington for the land in question, was a substantial compliance with statute in force at the time of her said acknowledgment. And this verdict and judgment being "clearly right," there was no occasion for raising the federal question. And as a further answer we might say, if it were necessary to answer further, that it does not appear *affirma-*

tively, that the federal question was *not* raised in the hearing of Laidley's writ of error.

But there is a further and conclusive answer to the proposition contended for by the defendant in error. The judgment of the Supreme Court of Appeals of West Virginia reversing the judgment of the court below and remanding the case to that court for a new trial to be had therein, was not a final judgment from which an appeal could have been taken to this Honorable Court.

Bostwick v. *Brinkerhoff*, 106 U. S. 3.

Johnson v. *Keith*, 117 U. S. 199.

But another objection was made to the jurisdiction of this Court, which requires to be stated more at length. While the case was pending in the Circuit Court of Summers county, as before stated, an order of that court was made and entered which is found on pages 198, 199, of the record, which order, it was claimed, was a sufficient ground for the affirmance of the judgment of the court below in favor of Laidley, by the Supreme Court of Appeals of West Virginia, regardless of any *federal* question that might have been involved in the case. But in view of what follows we deny this contention. The order of the court referred to was made on the 5th day of September, 1888. And on the 6th day of May, 1889, eight months thereafter, on motion of the plaintiff, Laidley, a second order of survey was made and entered in the case by the Circuit Court of Summers county, and the case was remanded by said court to the Circuit Court of Cabell to be there tried and determined. Record, p. 199.

And the survey was made as so ordered. Record, p. 223.

On the 31st day of August, 1889, the case was docketed in the Circuit Court of Cabell county and continued to the then next term of the court. Record, p. 200. And on the 12th day of May, 1890, the parties by their attorneys appeared in said court, and among other proceedings had in this case, the plaintiff, Laidley, "moved the court to render judgment upon the said order of September 5th, 1888, and the agreement of the defendant therein contained in favor of the plaintiff against the defendant for a fee-simple estate in the lands in the decla-

ration mentioned, to which motion the defendant objected." And the court, after hearing the evidence of the parties, took time to consider of said motion. Record, p. 200.

And on the following day the court gave judgment overruling the said motion, and the plaintiff excepted to the ruling of the court, but failed to file a bill of exceptions, and the evidence of the parties on said motion, is not in the record. The case was thereupon tried by a jury, who failed to agree on a verdict. Record, pp. 201, 202, 203.

The said order of the Circuit Court of Cabell county denying the motion of the plaintiff, Laidley, for a judgment in his favor, as aforesaid, in pursuance of the said order of the Circuit Court of Summers county of the 5th day of September, 1868, was never in anyway vacated, annulled or set aside, but remained and still remains in full force and virtue. And the presumption of law is, in the absence of *any* proof to the contrary, that the said order was right, and the record of the case, we submit, tends to sustain that presumption.

At the second trial of the case when judgment in the court below was given for the plaintiff, the motion for a judgment in pursuance of said order was not, again, made, and the attention of the court was not called to said order by any of the instructions asked for by the plaintiff, on the trial, to be given to the jury. And it can, we submit, be fairly presumed, that the plaintiff, knowing he was not entitled to a judgment by said order abandoned it.

And the attention of the court is here called to section 13, of chapter 90, of the Code of West Virginia, which chapter treats of the action of ejectment, and provides, among other things, as follows:

"13. The defendant may demur to the declaration, as in personal actions, or plead thereto, or do both. But he shall plead the general issue only, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration. Upon such plea, the defendant may give in evidence any matter which, if pleaded in the former writ of right, would have barred the action of the plaintiff."

The defendant in the court below, could not, under this

section, raise the *federal* question by a plea, but only by an instruction to the jury which it did.

It is a *maxim* in law, ihat "*That there is no wrong without a remedy.*" And in the light in which we view the great wrong perpetrated in this case, it seems to us that if, in the annals of jurisprudence, there ever was a case which imperatively demanded the rigid enforcement of this *maxim*, this is *that case.*

And now, in conclusion we confidently maintaim that the judgment of the Supreme Court of Appeals of West Virginia in favor of John B. Laidley, the defendant in error, should be reversed and annulled and that the title of The Central Land Company of West Virginia, the plaintiff in error, to the land in question, should be declared good and valid by the judgment of this Honorable Court.

All of which is respectfully submitted,

JAMES H. FERGUSON,
and
SIMMS & ENSLOW,
Of Counsel for plaintiff in error.

MAR 27 1905
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

THE CENTRAL LAND COMPANY OF WEST VIRGINIA, PLAINTIFF IN ERROR,

vs.

JOHN B. LAIDLEY, IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Brief of F. B. Enslow, of Counsel for Plaintiff.

HUNTINGTON:
DAILY ADVERTISER PRINT.
1905.

SUPREME
Court of the United States.

THE CENTRAL LAND COMPANY OF WEST VIRGINIA, *Plaintiff in Error*,

vs.

JOHN B. LAIDLEY, *In Error to the Supreme Court of Appeals of the State of West Virginia.*

BRIEF OF F. B. ENSLOW, OF COUNSEL FOR PLAINTIFF.

Statement of the Case.

The brief heretofore filed in this cause by James H. Ferguson, Esq., states fully the contention of the plaintiff in error, but since the writing of the brief there are questions which have been raised by the brief of the attorneys for the defendant in error to which we desire to make a brief reply.

As was stated in our former brief in this case, by deed dated August 18, 1865, Rebecca J. Everett conveyed to Mrs. Sarah H. G. Pennybacker a tract of land situated in Cabell county, West Virginia, containing two hundred and forty acres, in consideration of $8,000.00, cash in hand paid to her, Mrs. Pennybacker being at that time a

married woman and the wife of John M. Pennybacker. By deed dated February 25, 1870, Mrs. Pennybacker, together with her husband, John M. Pennybacker, sold two hundred and thirty-nine acres of the land and conveyed the same to C. P. Huntington in consideration of $11,000.00 cash, which consideration was paid and received by the grantors.

At the date of this conveyance, February 25, 1870, a married woman, in order to make a valid conveyance of her land, was required to join with her husband in the execution of the deed, and acknowledge it, as provided by statute, which statute is found in the Code of 1868 of West Virginia, Page 470, Section 4, and is as follows:

"When a husband and wife have signed a writing purporting to convey real estate, she may appear before a recorder authorized to admit such writing to record in his office, and if, on being examined privily and apart from her husband by such recorder, and having such writing fully explained to her, she acknowledge the same to be her act, and declare that she had willingly executed the same and does not wish to retract it, such privy examination, acknowledgment and declaration shall then be recorded by such recorder in his office, or she may appear before a justice, notary public, recorder, prothonotary, or clerk of any court within the United States, or a commissioner appointed within the same by the Governor of this State, and such justice, notary public, recorder, prothonotary, clerk or commissioner may so examine her, and if, after such explanation, she make such acknowledgment and declaration, shall certify the same on, or annexed to the said writing, to the following effect, to-wit:

"State (or territory or district) of————, County of ————, to-wit:

"I, ———, a commissioner appointed by the Governor of the State of West Virginia, for the said State (or territory or district) or ———, (or I, ———, a justice for the county aforesaid, and township of ———; or I, ———, recorder of said county; or I, ———, a notary pub-

lic for the county aforesaid; or I, ———, prothonotary (or clerk) of the ——— Court of said county), do certify that ———, the wife of ———, whose names are signed to the writing above (or hereto annexed), bearing date on the ——— day of ———, personally appeared before me in the county aforesaid (or if it be a commissioner, in the State, territory or district aforesaid; or if it be a justice, in the township aforesaid), and being examined by me privily and apart from her husband, and having the said writing fully explained to her, she, the said ———, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

"Given under my hand, this ——— day of ———."

The deed of Mrs. Pennybacker and her husband of February 25th, 1870, is found on pages 25, 26 and 27 of the record in this cause, and so far as the execution and the recording of the said deed is concerned, is regular, and complies with all of the requirements of the law except as to the acknowledgment of Sarah H. G. Pennybacker, the wife of John M. Pennybacker, and as to that, the acknowledgment is in the words and figures following:

"STATE OF WEST VIRGINIA,
"COUNTY OF CABELL.

"Personally came before me, the undersigned, Recorder of the county and State aforesaid, Sarah H. G. Pennybacker, wife of the above mentioned John Pennybacker, and party to the foregoing deed, and being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed and delivered the same, and wished not to retract it.

"Given under my hand and seal this 25th day of February, 1870.

"THOS. J. HAYSLIP, Recorder. [SEAL.]"

After the purchase of the said property from Mrs. Pennybacker by C. P. Huntington he sold the same to The Central Land Company, and he and his grantee have had actual possession of the property ever since.

In 1881 John M. Pennybacker, the husband of Sarah H. G. Pennybacker, died, and on January 26, 1882, John B. Laidley, the defendant in error, procured Mrs. Pennybacker, then out of possession, to convey the same land to him in consideration of $500.00. After this conveyance was made and while The Land Company was still in possession, the defendant in error brought his action in ejectment to recover possession of the property, basing his claim thereto solely upon his deed from Mrs. Pennybacker.

Such proceedings were had in this suit in the Circuit Court of Cabell county, West Virginia, as resulted in a verdict of a jury and a judgment in favor of the said Laidley for the possession of the said tract of land, then valued at about $200,000.00.

The Central Land Company, the defendant, applied for a writ of error and supersedeas to said judgment to the Supreme Court of Appeals of West Virginia, which was refused. Upon the refusal of the Supreme Court of Appeals to award a writ of error the plaintiff in error applied to this court for a writ of error to said Supreme Court, setting up as a ground for its application that as the statute of the State of West Virginia was and had been construed by the courts of Virginia and West Virginia prior to that time, that the acknowledgment of Sarah H. G. Pennybacker to the said deed to the said C. P. Huntington was a valid acknowledgment and conveyed all of her title in said tract of land to him at that time, and that by the decision of the Circuit Court of Cabell county, as affirmed by the Supreme Court of Appeals of West Virginia, in refusing to award a writ of

error, an entirely new construction had been placed upon the statute of the State of West Virginia, and that by such construction so placed upon such statute the law as it was at the time of the purchase by the said Huntington of the said tract of land, had been by such construction entirely changed, and a deed and contract which was valid at the time and date of its making, was by such construction rendered inoperative and void, and that such changed construction of the statute and of the law of the State of West Virginia from what it was at the date of the conveyance, had the same effect as though the law as it existed upon the statute books of West Virginia at the date of the conveyance had been changed by legislative enactment, and that by virtue of such change the plaintiff in the ejectment suit had sought to avoid the deed.

At the time of the trial of this cause in the Circuit Court of Cabell county the court instructed the jury as follows:

"The Court instructs the jury that if they believe from the evidence that at the time of the execution of the deed of February 27th, 1870, by J. M. Pennybacker and wife to C. P. Huntington, Sarah H. G. Pennybacker was a married woman, then said deed to Huntington is absolutely void as to her and passed no title, legal or equitable, to said Huntington, and that Mrs. S. H. G. Pennybacker was as fully vested with the title to the land therein mentioned after said deed was made as before, and had full power thereafter by deed to convey the same to whom she pleased, and vest in such purchaser as good title thereto as she had before said deed to Huntington.

"And the Court further instructs the jury, that by the deed from Mrs. Sarah H. G. Pennybacker to John B. Laidley, of January 26th, 1882, he acquired and became vested with all the title and interest in the land which Mrs. S. H. G. Pennybacker had."

And upon the giving of such instruction, the defend-

ant below, the plaintiff in error here, requested the Court to give the following instruction:

"If the jury find from the evidence that C. P. Huntington purchased, paid for and took possession of the tract of 240 acres in controversy, on the 25th of February, 1870, or at any time thereafter, by virtue of and under claim of the deed of John M. Pennybacker and S. H. G. Pennybacker, dated Feb'y 25th, 1870, and that the said C. P. Huntington, after that time and before the institution of this action, conveyed by deed said tract to the defendant, The Central Land Company of West Virginia, who took possession of said tract and has held possession thereof ever since, then the Court instructs that by Section 8 of Article 11 of the Constitution of the State of West Virginia, adopted by the people thereof in the year 1863, and by Section four of Chapter 73 of the Code of West Virginia of 1868, which section four was taken from the Code of Virginia of 1860, and was in force in the territory included in the State of West Virginia at the time of the adoption of said constitution, and had received a construction, or settled interpretation, before the formation of the State of West Virginia, in the cases of Hairston, etc., vs. Randolph, 12th Leigh, 445; Siter, Price & Co. vs. McClannachan, 2nd Gratton, 280, and Grove vs. Zumbro, 14th Gratton, 514, and that under the interpretation given to said section four by the Supreme Court of Appeals in the three decisions aforesaid, the said deed of John M. Pennybacker and S. H. G. Pennybacker, dated Feb. 25th, 1870, with the acknowledgments and certificate of recordation attached, was sufficient to pass to C. P. Huntington, at the time of its execution, all of the right, title and interest of every kind whatsoever of the said John M. Pennybacker and S. H. G. Pennybacker to said tract of 240 acres, you should find a verdict in this case for the defendant," which the Court refused to give.

ARGUMENT.

This being the decision of the Circuit Court, and not of the court of last resort, The Central Land Company, the plaintiff in error here, applied to the Supreme Court of Appeals of West Virginia for a writ of error, asking that the said judgment be reversed, on the ground that the Circuit Court of Cabell county had misdirected the jury as to the law applicable to the case, and had erred in holding the certificate to the deed of Mrs. Pennybacker invalid.

The Supreme Court of Appeals, by its decision rendered on the 14th day of November, 1890, refused the writ of error and supersedeas on the ground, as stated by it, that the judgment complained of was plainly right. This action of the Circuit Court, and the affirmation of the same by the Supreme Court of Appeals, for the first time, so far as this plaintiff was concerned, changed the settled ruling and construction of the statute and the law governing the acknowledgment of married women in West Virginia, and if such construction was allowed to stand it would have the same effect in its operation on contracts and existing contract rights accruing under the former construction as a statute passed on that day changing the law would have, and as stated in the case of Douglas against the County of Pike, 101 U. S., page 677, "Such construction may be prospective, but cannot be retroactive"

If, now, the acknowledgment of Mrs. Pennybacker to the deed of February 25, 1870, was valid at the time it was made, then the title of The Central Land Company was a valid and subsisting title, and the defendant in error here could not, by a change in the construction of the statute as it existed at the date of the deed, obtain any title to the

said land, and the courts of West Virginia, in deciding that the acknowledgment was invalid, would impair the obligation of a contract, valid at its inception.

In the brief heretofore filed we believe we have fully shown that as the law stood prior to the decision of this case, the acknowledgment to the deed of February 25th was valid. If that is true, then the attempt of the courts of West Virginia to invalidate the acknowledgment by its holding in the ejectment suit of Laidley against The Central Land Company is an attempt to deprive the plaintiff in error of its property without due process of law. Such decisions and holdings are retroactive in their effect, and unconstitutional on the ground that they impair the obligation of a valid and subsisting contract, and while the Constitution of the United States, Section 10, Article 1, provides that no State is permitted to pass any law impairing the obligation of contracts, the State, or the Courts thereof, cannot be permitted by changing the construction to do indirectly what they cannot do directly.

The defendant in error claims that under the ruling of this court in Morrison against Watson, 154 United States, Page 111, and Miller against Texas, 153 United States, 535, Schuyler National Bank vs. Bollong, 150 United States, Page 85, that this question of the unconstitutionality of the decisions complained of are not sufficiently raised in the court below. Our answer to this contention is, that while the courts in the cases stated held that the question had not been raised, this is a case of an entirely different sort from the cases cited, because here, until the court of last resort had affirmed the decision of the lower court, changing the settled construction of the statute, the plaintiff in error had no cause to complain, and it could not be supposed that the Supreme Court of West Virginia would lend itself to any such forced

construction of a statute as it did by holding that the decision of the lower court was plainly right. By these two instructions herein set out the question as to what the law was at the time of the making of the deed was brought to the knowledge of the court, and by its refusal to instruct as requested in the instructions asked for by the defendant in the ejectment suit in the court below, and by the giving of the instructions on behalf of the plaintiff Laidley, it attempted to do, as we have stated indirectly, what the Constitution of the United States, would not permit the law-making power of a State to do. When this construction was approved by the Supreme Court, then, and for the first time, the Constitution of the United States, Section 10, Article 1, was violated, and by the statement contained in the record on pages Nos. 193, 194 and 195 it is shown that the plaintiff in error here, when before the Supreme Court of the State of West Virginia, raised the question as to the constitutionality of the action of the Circuit Court and asked and was allowed permission to withdraw the record from the Supreme Court for the purpose of testing the question as to the constitutionality of the action of the Supreme Court of West Virginia before the Supreme Court of the United States.

The action of the Supreme Court itself in affirming the changed construction of the statute violated the constitutional provisions contained in Section 10, Article 1 of the Constitution of the United States, and then for the first time made it possible for the plaintiff in error here to appeal for protection of its rights under the Constitution to this court. We, therefore, submit that not only is there a Federal question involved in the decision of this case, but that the said question was raised in the only manner that it could be raised in the State courts, and that the action of the State courts, and their action alone,

compelled the plaintiff in error here to apply to the only tribunal which could take cognizance of the wrong done and afford a remedy for the wrong inflicted by the action of the Supreme Court of West Virginia, and that this case presents a very different phase from any case relied upon by the defendant in error to show that the Federal question was not properly presented in the lower courts.

The other ground insisted upon by the defendant in error to show why this Court should not take cognizance of this case is, that under and by virtue of the order entered in the Circuit Court of Summers County, when the ejectment suit was pending in Summers County, the plaintiff in error here is estopped and the plaintiff's right to a judgment in the action of ejectment made conclusive. This agreement is found on Pages 198 and 199 of the printed record. If this agreement had any force, or would have at any time operated as an estoppel against the plaintiff in error here, all benefit accruing under it was, as we will show hereafter by the record, expressly waived by Laidley, the defendant in error; but even if it had been in force, all the effect it could have had would have been to have allowed a judgment to have been entered in the ejectment suit under the ruling of the Court that the acknowledgment to the deed of February 25th, 1870, of Mrs. Pennybacker to C. P. Huntington was invalid. It could not have been treated as a judgment by consent, and if the Court had entered up a judgment under that agreement, on the record of the case as shown, it would still have been by virtue of the same changed construction of the statute, and if the Supreme Court of West Virginia had affirmed the same on appeal at that time the Federal question involved would by such affirmance be raised as well on the judgment so entered as on the one that finally was rendered, because the plea of not guilty was already entered and defense made and the agree-

ment could only have had the effect to preclude any other additional defense being made outside of and in addition to the plea of not guilty, which was already entered and relied on; but the plaintiff in error cannot be affected here by any construction of the agreement that may be now sought to be placed upon it by the defendant in error, because, as will fully appear from the record in this case, when the action in ejectment was transferred to Cabell County, the plaintiff there moved the Court, on the 12th day of May, 1890, to render judgment upon the order of September 15th, 1888, to which motion the defendant, The Central Land Company, objected, and the Court, having heard the motion, took time to consider until the next day, and on May 13th, 1890, overruled the motion for a judgment on the agreement, as will be seen from the order of the Court on Pages 200 and 201 of the printed record. To this ruling of the Court the plaintiff below, Laidley, excepted, but filed no bill of exceptions, setting out the evidence that caused the Court to make such ruling, and waiving his right to appeal from that order, demanded a jury and tried the case.

The orders are in the words and figures following, to-wit:

"J. B. LAIDLEY, Plaintiff, vs. "THE CENTRAL LAND CO. OF W. VA., Defendant.	In Ejectment.

AND

"J. B. LAIDLEY, Plaintiff, vs. "THE CENTRAL LAND CO. OF W. VA., Defendant.	In Ejectment; Consolidated.

"This day came the plaintiff, by his attorneys, and the defendant, by its attorneys, and thereupon the defendant

moved the Court for a stay of proceedings in these causes until the decision of the Supreme Court on the appeal hereinafter mentioned, upon the ground that there is pending in the Supreme Court of Appeals in this State an appeal by the defendant from a decree in this Court in the chancery cause of The Central Land Company of West Virginia against said J. B. Laidley and others, and read in evidence in support of said motion the record of said chancery suit and of the appeal thereon, and the plaintiff resisted said motion and insisted upon a trial of said action of ejectment; and the Court having fully considered the matters arising upon said motion, doth decide to stay said actions until the decision of the Appellate Court in said chancery cause, upon condition, and not otherwise, that said defendant, The Central Land Company of West Virginia, agrees here in open Court that judgment be at once entered for the plaintiff in said actions of ejectment for the estate in fee simple in the lands in the declarations in said actions described, without further defense, in event the decree aforesaid in said chancery suit be affirmed upon said appeal so far as it relates to the title in the land, but judgment so to be entered to be without prejudice to the right of the defendant, if any it has, to compensation for any improvements it may have placed upon the lands in controversy; and thereupon the said defendant in open Court accepted said stay of proceedings in said actions of ejectment upon the terms aforesaid."

"JOHN B. LAIDLEY vs. "THE CENTRAL LAND CO. OF W. VA.	In Ejectment.

AND

"JOHN B. LAIDLEY vs. "THE CENTRAL LAND CO. OF W. VA.	In Ejectment; Consolidated.

"This day came the parties by their attorneys, and thereupon the defendant, by its attorneys, tendered a special plea to the jurisdiction of the Court, to the filing of which the plaintiff objected, which objection, being ar-

gued by counsel, is sustained and said plea rejected; and thereupon the plaintiff tendered a certified copy of the record of the chancery suit of The Central Land Company of West Virginia against said Laidley and others, lately pending in the Circuit Court of Summers county, and the same mentioned and referred to in the order in these causes entered on the 5th day of September, 1888, and also a certified copy of the mandate of the Supreme Court of Appeals entered in said chancery cause on the appeal mentioned in said order of September 5th, 1888, which mandate and record are ordered to be filed; and thereupon the plaintiff moved the Court to render judgment upon the said order of September 5th, 1888, and the agreement of the defendant therein contained in favor of the plaintiff against the defendant for a fee simple estate in the lands in the declaration mentioned, to which motion the defendant objected, and the Court, not being advised as to what judgment it should render therein, takes time to consider thereof."

"JOHN B. LAIDLEY VS. "THE CENTRAL LAND CO. OF W. VA.	In Ejectment.

AND

"JOHN B. LAIDLEY VS. "THE CENTRAL LAND CO. OF W. VA.	In Ejectment; Consolidated.

"This day again came the parties by their attorneys, and thereupon the Court doth overrule the motion of the plaintiff, made on yesterday, for judgment against the defendant, pursuant to the conditions and agreements of the order entered in this cause on the 5th day of September, 1888, and refused to enter said judgment, to which ruling of the Court the plaintiff objected and excepted, and his said exceptions are saved to him.

"And thereupon the plaintiff tendered his statement of his claim for profits and other damages which he means to demand in these suits, which is ordered to be filed; and on his motion it is ordered that the assessment of said

damages and the allowance for improvements, if any, be postponed until after the verdict on the title is recorded.

"Thereupon came a jury, to-wit: Rezin Swann, Robert Caldwell, Conwelza Conner, H. C. Bellamy, Ewall Bias, Harvey Templeton, L. D. Hughes, Albert Keller, Henry Kratzer, L. G. Blankenship, B. F. Dillon and John L. Dillon, who were drawn, selected, tried and sworn in the manner required by law to well and truly try the issues joined herein and a true verdict render according to the evidence; and the jury having heard a part of the evidence, they were, with the assent of the parties, adjourned by the Court until tomorrow morning at 8:30 o'clock."

If the defendant in error had any rights under this order entered in Summers county, or if it gave him the right to a judgment, the State Court where the case was tried, which entered the order, had the right to determine what these rights were. On full hearing of the matter, and after careful consideration, the Circuit Court of Cabell county refused to enter a judgment on the order, and while the plaintiff below excepted, he filed no bill of exceptions and took no appeal from such actions of the Court. The record not showing the facts on which the Court acted, its actions must be taken as conclusive and final, until properly reversed, no writ of error having been applied for, and the defendant in error here having elected to go on and try the case before a jury, by such election waived any rights he may have had, even if the facts showing an express waiver and relinquishment were not allowed to be proven, which the defendant below, the plaintiff in error here, offered to prove, as will be seen on page No. 233 of the printed record.

If, however, the trial Court in West Virginia had rendered a judgment upon the so-called agreement entered in the Summers county Circuit Court, and the case was before this Court upon such judgment, then there

might be something in the contention of the defendant in error, that the judgment complained of could be sustained on two distinct grounds, one of which does not involve the Federal question, but inasmuch as the judgment here is not rendered upon the agreement, and was not so rendered by the election of the defendant in error himself, the only ground upon which the judgment now here can be sustained is by its being made to appear to this Court that it is valid and not in contravention of the Constitution of the United States, and we submit that inasmuch as it is a judgment which entirely changes the judicial construction of a statute having the same effect in its operation as a legislative enactment declaring the contract void would have, that it is in violation of the Constitution of the United States and raises a Federal question that is alone and properly cognizable in this Court.

On this question we submit the case, and respectfully ask a reversal of the judgment complained of.

F. B. ENSLOW,
Of Counsel.

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THE CENTRAL LAND COMPANY, of West V

vs.

JOHN B. LAIDLEY.

In Error to the Supreme Court of Appeals of [illegible]

Brief of Counsel for Defendant in Error.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CENTRAL LAND COMPANY, *of West Virginia*,

vs.

JOHN B. LAIDLEY.

On Motion to Dismiss and Affirm.

STATEMENT OF THE CASE.

In 1882, John B. Laidley brought an action of ejectment in the Circuit Court of Cabell county, West Virginia, against the Central Land Company, of West Virginia, to recover a tract of land containing about 240 acres in the city of Huntington. (Record page 2.) Both plaintiff and defendant claimed title to the land from Mrs. S. H. G. Pennybacker, who was the admitted owner of the land on the 25th day of February, 1870, and at that time a *married woman*. On said last named day Mrs. Pennybacker and her husband signed a deed purporting to convey the land to C. P. Huntington. (Record page 25.) On the 16th day of October, 1871, Huntington conveyed his title to the Central Land Company. (Record page 28.)

Both Laidley and the Central Land Company were and are citizens of the State of West Virginia.

Laidley claimed title to the land under a deed from Mrs. Pennybacker, dated the 26th day of January 1882, (Record page 24,)

executed after the death of her husband, which occurred in 1881.

Laidley relied for a recovery upon the fact that the deed from Mrs. Pennybacker to Huntington only conveyed the freehold estate of her husband during their joint lives, and was void as to her, because of defects in the certificate of acknowledgement.

On the trial of this cause in the Circuit Court, in December, 1884, the plaintiff prayed the following instruction to the jury:

"The court instructs the jury that the deed executed by J. M. Pennybacker to C. P. Huntington, bearing date the 25th day of February, 1870, offered in evidence by the plaintiff and purporting to be also signed by S. H. G. Pennybacker, and purporting to be also acknowledged by Sarah H. G. Pennybacker, is a good deed for the purpose of conveying the interest of John M. Pennybacker in the lands therein mentioned, and the court also instructs the jury that if they find from the evidence, that the said Sarah H. G. Pennybacker at the time of the execution and acknowledgment of the said deed was the wife of the said John M. Pennybacker, then the said deed is not valid so far as it purports to be her deed, and does not convey any interest she may have had in said land; and cannot operate against her or her grantees by way of estoppel." (Record page 75.)

The trial court refused this instruction; to which action the plaintiff excepted, and the case being submitted to the jury, a verdict was found for the defendant, on which the Court entered judgment (Record page 14.) Laidley thereupon took the case to the Supreme Court of Appeals of West Virginia. In his petition for the writ of error, the first error assigned was the following:

"The court erred in refusing to give the instruction asked for by the plaintiff, stating the legal effect of the deed from John M. Pennybacker to C. P. Huntington, dated 25th day of February, 1870." (Record page 1.)

On the hearing of this appeal, the Supreme Court of West Virginia, on the 26th day of November, 1887, held that the certificate of acknowledgement to the said deed from Mrs. Pennybacker to Huntington, was fatally defective; that Mrs. Pennybacker's title in fee, did not pass under that deed, and that Laidley was entitled to the instruction above set out. (Record page 196; Laidley *v.* Central Land Co., 30 West Va. Rep. 705.)

This was a decision of the court of last resort in the State of West Virginia, that Mrs. Pennybacker's deed to Huntington did not pass the fee. On the hearing of this appeal no federal question was ever raised, or suggested, to the Supreme Court of West Va. as involved in the decision. And no attempt has ever been made to review this decision of said Supreme Court, either by petition for rehearing, or by writ of error from the Supreme Court of the United States. The decision became final and binding at the end of the term at which it was pronounced.

While Laidley's appeal from the first trial in the ejectment suit, was pending in the Supreme Court of West Virginia as above set out, and as yet undecided, the Central Land Company, in June 1887, filed a bill in equity against Laidley, for the purpose of cancelling his deed from Mrs. Pennybacker, as a cloud upon its title,

or in case the certificate of acknowledgement to Mrs. Pennybacker's deed to Huntington should be held bad, that then Laidley might be decreed to hold the legal title to the land *in trust* for the Central Land Co., and compelled to convey the same to it. (Record page 80.)

Upon the decision of the Supreme Court of West Virginia above stated, the Land Company, in March, 1888, filed an amended and supplemental bill, for the purpose of having Laidley declared a *trustee* of the legal title, for its benefit. (Record, page 91). This last bill contained the following allegations:

"And this plaintiff further complaining avers and says, that since the filing of the original bill herein, the appeal, writ of error and supersedeas from said to the judgment of the circuit court of Cabell county, obtained by said Laidley to and from the Supreme Court of Appeals of this State, referred to in the original bill herein, and the said printed record Exhibit "A," therewith filed, has been heard and determined by the said court; and the said court has reversed the judgment of the court below in favor of the validity and sufficiency of the said acknowledgment of the said S. H. G. Pennybacker of said deed; and has *decided that said certificate is defective in law, and consequently that the said deed did not convey her title to said land to Mr. Huntington*, and therefore the said cause was remanded for a new trial; and the same, with other actions of ejectment against its said vendees, brought by said Laidley, are now pending in this court on the law side thereof; and the plaintiff is now advised and believes and charges, that under and by virtue of this decision of said Supreme Court of Appeals *the legal title to the said real estate in controversy in this suit, no matter how it may have been wrongfully and fraudulently obtained, is in the defendant Laidley, etc.*" (*Record, page 97*).

This chancery suit, as well as the ejectment suit having been removed to the Circuit Court of Summers county, West Virginia, because the Judge of Cabell Circuit Court was not in a position to try the case, that Court on the 14th day of May, 1888, dismissed the plaintiff's original and amended and supplemental bills. (Record page 193); from this decree the Land Company took an appeal to the Supreme Court of West Virginia. (Record, page 79); upon the hearing of which, the decree of the court below, dismissing said bills, was affirmed, on the 11th day of February, 1889. (Record, page 228: Central Land Company *vs.* Laidley, 32 West Va. Rept. page 134.

While the said appeal of the Central Land Company was pending in the Supreme Court, the Land Company asked the Circuit Court for a stay of proceedings in the ejectment suit, and thereupon the following order was entered under the following provision of the Code of West Virginia:

"§ 6. Whenever it shall be made to appear to the circuit court or to the judge thereof in vacation, that a stay of proceedings in a case therein pending, should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein *upon such terms* as may be prescribed in the order." Code W. Va. ch. 136 § 6.

J. B. Laidley, plaintiff,
vs.
The Central Land Company of W. Va., defendant. } In Ejectment.

and

J. B. Laidley, plaintiff,
vs.
The Central Land Company of W. Va., defendant. } In Ejectment consolidated.

This day came the plaintiff by his attorneys, and the defendant by its attorneys; and thereupon the defendant moved the court for a stay of proceedings in these causes until the decision of the Supreme Court on the appeal hereinafter mentioned; upon the ground that there is pending in the Supreme Court of Appeals of this State, an appeal by the defendant from a decree in this court, in the chancery cause of the Central Land Company of West Virginia against J. B. Laidley and others; and read in evidence in support of said motion, the record of said chancery suit and of the appeal thereon; and the plaintiff resisted said motion, and insisted upon a trial of said action of ejectment; and the court having fully considered the matters arising upon said motion, doth decide to stay said action until the decision of the Appellate court in said chancery cause, upon condition and not otherwise, that said defendant, The Central Land Company of West Virginia, agrees here in open court that judgment be at once entered for the plaintiff in said action of ejectment, for the estate in fee simple in the lands in the declaration in said action described, without further defense, in event the decree aforesaid in said chancery suit be affirmed upon said appeal, so far as it relates to the title in the land, but judgment so to be entered to be without prejudice to the right of the defendant, if any it has, to compensation for any improvements it may have placed upon the lands in controversy; *and thereupon the said defendant in open court accepted said stay of proceedings upon the terms aforesaid.*" (Record, page 199).

On the 6th day of May, 1889, the ejectment suit was remanded from the Circuit Court of Summers county, to the Circuit Court of Cabell county, on motion of the Land Company, a new Judge having been elected in the Cabell Circuit meanwhile. (Record, page 199.)

At the May term, 1890, of the Circuit Court of Cabell county, the ejectment suit was again tried; and ended in a hung jury. (Record, page 203.) At the September term, 1890, to-wit, on the 12th day of September, 1890, of said court, another trial of the ejectment suit was had, and a verdict rendered in favor of the plaintiff, John B. Laidley; on which verdict the court entered judgment. (Record, pages 204, 206.) To this judgment, the Supreme Court of West Virginia on the 14th day of November, 1890, refused to grant a writ of error and supersedeas, on the ground that the judgment was plainly right. (Record, page 193.)

It is to this last judgment of the Supreme Court of Appeals of West Virginia, rendered on the 14th day of November, 1890, *nearly three years after its first decision holding the certificate on the deed from Mrs. Pennybacker to Huntington to be bad*, that the Central Land Company has sued out the present writ of error from the Supreme Court of the United States. (Record pages 259 *et seq.*)

What is the federal question involved in this case on which the

Central Land Company relies to maintain the jurisdiction of the Court?

It is upon the theory that, at the date of the deed from Mrs. Pennybacker to Huntington, the certificate of the privy examination and acknowledgment was good under the decisions of the Court of Appeals of Virginia rendered before the formation of West Virginia; and that the principles of these decisions had not been changed by the Legislature of West Virginia, or any decision of the court, before the deed from Mrs. Pennybacker to Huntington, and that thereby Huntington obtained a vested right to the land which would be protected under the constitution of the United States, (Record page 260,) and therefore the Circuit Court of Cabell county, upon the last trial of the ejectment suit, erred, in giving plaintiff's instruction No. 5, and in refusing defendant's instruction No. 1. These instructions are hereinafter set out in full.

At the last trial of the action of ejectment in September, 1890, in Cabell county, the plaintiff, Laidley, gave in evidence to the jury, the record of said suit in Chancery, the final judgment thereon by the Supreme Court of Appeals in his favor, and the above agreement of record, of the Land Company, that judgment should go in his favor if the appeal in the chancery suit should be decided adversely to the Land Company; (Printed record pages 229, 227, 80, 76.) and insisted that these matters were conclusive as estoppel against the Land Company, and entitled him, Laidley, to a judgment, without reference to the paper titles and without reference to the validity or invalidity of the Huntington deed, to which alone the two instructions above mentioned relate.

THE INSTRUCTIONS.

The two written instructions above referred to and set out in the Land Company's application for this writ of error are as follows:

PLAINTIFF'S INSTRUCTION NUMBER 5.

"The court instructs the jury, that if they believe from the evidence, that at the time of the execution of the deed of February 25th, 1870, by J. M. Pennybacker and wife, to C. P. Huntington, Sarah H. G. Pennybacker was a married woman, then said deed to Huntington is absolutely void as to her, and passed no title legal or equitable to said Huntington; and that Mrs. Sarah H. G. Pennybacker was as fully vested with the title to the land therein mentioned, after said deed was made as before, and had full power thereafter by deed to convey the same to whom she pleased, and vest in such purchaser as good title thereto as she had before said deed to Huntington; and the court further instructs the jury that by the deed from Mrs. Sarah H. G. Pennybacker to John B. Laidley of January 26th, 1882, he acquired and became vested with all the title and interest in the lands that Mrs. S. H. G. Pennybacker had." (Printed record, page 255.

DEFENDANT'S INSTRUCTION NO. 1.

"If the jury finds from the evidence that C, P. Huntington, purchased, paid

for, and took possession of the tract of 240 acres in controversy on the 25th day of February, 1870, or any time thereafter by virtue of and under claim of the deed of John M. Pennybacker, and S. H. G. Pennybacker, dated Feb'y 25th, 1870, and that the said C. P. Huntington after that time and before the institution of this action, conveyed by deed said tract to defendant, The Central Land Company of West Virginia, who took possession of said tract, and has held possession thereof ever since then, the court instructs that by section 8 of Article II of the Constitution of the State of West Virginia, adopted by the people thereof in the year 1863, and by section 4 of chapter 73 of the Code of West Virginia of 1868, which section 4 was taken from the Code of Virginia of 1860, and was in force in the territory included in the State of West Virginia, at the time of the adoption of the said Constitution, and had received a construction or settled interpretation before the formation of the State of West Virginia in the cases of Hairstone *vs.* Randolph, 12th Leigh 445, Sitzer, Price & Co. *vs.* McClanachan, 2 Grattan 280, and Grove *vs.* Zumbro 14 Grattan 514, and that under the interpretation given to said section 4 by the Supreme Court of Appeals in the three decisions aforesaid, the said deed of John M. Pennybacker and S. H. G. Pennybacker, dated Feb'y 25th, 1870, with the acknowledgment and the certificate of recordation attached, was sufficient to pass to C. P Huntington at the time of its execution all the right, title and interest of every kind whatsoever of the said John M. Pennybacker and S. H. G. Pennybacker to said tract of 240 acres, you should find a verdict in the case for the defendant."
(Printed record 256.)

On the motion to dismiss this Writ of Error, the defendant in error assigns the following grounds:

1. The judgment can be sustained on two distinct grounds, one of which does not involve a federal question.

The agreement of record in the action of ejectment, dated Summers county, September 5th, 1888, and the final conclusion of the chancery cause, referred to in that order, in favor of Laidley, are sufficient as an estoppel, to sustain the judgment in ejectment of September 12th, 1890, without reference to the validity or invalidity of the Huntington title, to which the instructions relate.

2. The plaintiff's instruction number five does not involve any question of federal jurisdiction.

Because it does not affirmatively appear from the record that a title, right, privilege or immunity under the constitution of the United States, *was specially set up or claimed*, and adversely decided by the court, by that instruction, against the claimant within the provisions of the third clause of the second section of the Act of February 5th, 1867. Nor is their drawn in question the validity of any treaty, or State statute, as provided in the first and second clauses of the same section. The mere fact that the State court holds a deed void, which this court might have held valid, does not raise any federal question.

3. Defendant's instruction, number one, without regard to any question of federal jurisdiction, was properly refused:

Because bad in form and substance, in that it left to the jury to construe the law of the Virginia cases named in the instruction.

and excluded from the consideration of the jury all the evidence in the case, except that in favor of the defendant; and [illegible] did it exclude from the jury all consideration of the [illegible] record dated September 5th, 1888, and which had been [illegible] evidence to the jury (record page 297.) Therefore if this instruction had specially set up or claimed any right or privilege under the constitution of the United States, it was rightly refused without passing upon such right or privilege. But this instruction does not specially set up, or claim, or call the court's attention to any such right or privilege.

4. Because if there ever was a federal question involved in the validity of Mrs. Pennybacker's deed to Huntington, the time and place to have specially set up and claimed it, was in the Supreme Court of Appeals of West Virginia, on the first appeal by Liddle in 1886, when the question of the validity of that deed was directly presented to the Supreme Court of the State.

The defendant in error now submits the following propositions of law:

First. When the judgment of a State Court can be sustained on two distinct grounds, one of which involves a federal question and one does not, the Supreme Court of the United States has no jurisdiction to review the judgment.

134 U. S. 607, Blount *vs.* Walker.
135 U. S. 244, Beatty *vs.* Benton.
133 U. S. 65, San Francisco *vs.* Itsell.
" " 380, Hopkins *vs.* McClure.
132 U. S. 554, Hale *vs.* Akers.
129 U. S. 178, Warien *vs.* Brinkley.
127 U. S. 216, DeSaussure *vs.* Jaillard.
127 U. S. 123, Adams Co. *vs.* B. & M. Co.
108 U. S. 105, Crosby *vs.* New Orleans.
111 U. S. 361 Santacruz *vs.* Santacruz.
91 U. S. 578, McManus *vs.* O'Sullivan.
81 U. S. 231, Kennebec *vs.* Portland.
20 Wallace 590, Murdock *vs.* Memphis.
125 U. S. 18, Water Works Co. *vs.* Louisiana Sugar Refinery Co.

If the judgment could have been based on the agreement of September 5, 1888, no jurisdiction can be taken by this court upon the ground of a supposed federal question.

Second. The meaning and intent of the State statute, and not its *validity* or constitutionalty, is the sole question involved in plaintiff's instruction number five (5.) If it appears that the decision of the State Court turned upon the *construction* and not the validity of the State statute, this court has no jurisdiction.

5 Howard 317, Commercial Bank *vs.* Buckingham.

12 Howard 165, Railroad Company *vs.* Marshall.
6 Peters 291, Green *vs.* Neal.
11 Peters 167, McBride *vs.* Hoey.
10 Wheaton 152, Elmendorf *vs.* Taylor.
12 Wallace 379, Knox *vs.* Exchange Bank.
8 Wallace 44, Furman *vs.* Nichol.
4 Wallace 181, R. R. Co. *vs.* Rock.
10 Wallace 511, R. R. Co. *vs.* McClure.
107 U. S. 33, Burgess *vs.* Selligman.
10 Peters 308, Crowell *vs.* Randolph.

Third, It must affirmatively appear from the record not only that the right under the constitution *was specially set up or claimed*, but also that it was *acted upon* by the State Court, and decided adversely to the claimant, or the jurisdiction does not exist.

It cannot be said that by giving instruction number 5 for *Laidley*, the court acted *on a right specially set up or claimed by the plaintiff* in error, under the constitution of the United States.

138 U. S. 635, Cook county *vs.* Calumet & Chicago Canal Co.
137 U. S. 48, Taxes Pacific Co. *vs.* Southern Pacific Co.
128 U. S. 132, Chappel *vs.* Bradshaw.
127 U. S. 216, DeSausure *vs.* Jaillard.
124 U. S. 391, Brooks *vs.* Mo.
114 U. S. 133, Detroit *vs.* Guthard.
110 U. S. 57, Susquehanna *vs.* Boom Company.
116 U. S. 54, Simmerman *vs.* Nebraska.
111 U. S, 200, Cheuteau *vs.* Gibson.
106 U. S. 97, Brown *vs.* Colorado.
71 U. S. Mississippi *vs.* Rock.
73 U. S. 258.

Fourth. A right under the constitution of the United States was not specially set up or claimed in defendant's instruction number one (1.) And if so, it does not affirmatively appear from the record that the Court acted on that question and decided the same against the plaintiff in error; but the court, for aught that appears, refused the instruction on entirely different and distinct grounds, which have been already pointed out.

The authorities cited above apply to the latter part of the above proposition.

The court may have been influenced by the pretended federal question in refusing the instruction; but not necessarily so. The instruction was erroneous and properly rejected, regardless of the merits of the question it proposed, but the well established principle already quoted, requires that the record must show affirmatively that the State Court denied to the plaintiff in error the right specially set up or claimed under the constitution.

Fifth. The mere fact that the State Court held the deed to be void, when this court, if the case had been before it, might have held the same deed good, presents no federal question.

Knox *v.* Exchange Bank, 12 Wall, 379.
R. R. Co. *v.* Rock, 4 Wall, 177.

There is no merit in the proposition attempted in the defendant's instruction number one (1). The statute to which it refers has always received the same construction in the State of Virginia, and in this State as well as in the sister States of the Union; that is, being an innovation on the Common Law it is strictly construed, and such construction has become a rule of property.

"The capacity of a *feme covert* to convey her estate by deed is a creature of the statute law and to make her deed effectual the forms and solemnities prescribed by the statute must be pursued."
Elliott *v.* Piersol, 1 Pet. 328.

The decision of the Supreme Court of Appeals of the State of West Virginia in this case on November 26th, 1887, (30 West Virginia Report p. 505), is not in conflict with the three decisions mentioned in the instruction. The Supreme Court governs its construction of the statute by those decisions; it does not reverse, contradict or overrule them, but approves and follows them. It does not adopt a liberal in place of a strict construction; there is no change of front on the part of the judiciary. The case of Grove against Zumbro, 14th Grattan 514 was decided before the execution of the deed to Huntington on the 25th of February, 1870, and after the decision of the case of Siter, Price & Co. against McClanachan, 2 Gratt. 219, and if the latter is overruled it is by the case of Grove and Zumbro, decided in 1850 before the date of the deed to Huntington; and not by the decision of the Supreme Court in this case. It cannot justly be said that the decision of the Supreme Court in this case, is the passage of a law by a State, in violation of the obligation of contract, within the prohibition of the constitution of the United States. It is not sufficient to justify the claim of federal jurisdiction, that the decision is *strictissimi legis*, or that this court would have been more liberal in its construction of the statute.

The first decision of the Supreme Court of Appeals of West Virginia, in this action, was made November 26th, 1877, reported in 30 W. Va., 505, by a unanimous court.

A deed precisely similar to the one now involved was construed the same way by the same Court in the case of Blair *v.* Sayre, in 29 W. Va., Rep. p. 605 prior to the decision in this case. The same construction of the statute was again unanimously approved by the Supreme Court of Appeals, composed of two new judges, in the case of the Central Land Company against Laidley on the 11th of February, 1889, and reported in 32 W. Va. page 184. And the Circuit Judge, who held the deed void, is now a member of the Supreme Court.

These decisions speak for themselves, and the attention of the Court is especially invited to the review of the authorities in the opinions of the court in those cases. And they do not justify the conclusion, that either in intention or in effect, a new rule of

property is thereby established, which is "diametrically" or otherwise opposed to the one theretofore existing, upon the same subject.

But it is very clear that even if there ever was a federal question involved in the decision on the validity of Mrs. Pennybacker's deed to Huntington, the right to raise it was lost to the plaintiff in error, by its failure to present the same to the Supreme Court of West Virginia on the first appeal by Laidley in 1886. What the Land Company now complains of, is that the circuit court in the trial in 1890, in obedience to the mandate of the Supreme Court of the State, instructed the jury that Mrs. Pennybacker's deed to Huntington was defective, and would not give the jury an instruction which left them at liberty to diregard the decision of the Supreme Court. Could a proposition be more absurd? On Laidley's first appeal in 1886, the question was directly presented to the Supreme Court, 'is or is not the certificate to Mrs. Pennybacker's deed invalid?" If any federal question was involved in the decision, it was incumbent on the Land Company to specially raise it and call the same to the attention of the Supreme Court. But no federal question was then thought of or suggested. No petition for a re-hearing was filed, and when the term of the Supreme Court ended, it was not within the power of that court to reverse its decision, that the deed from Mrs. Pennybacker to Huntington was invalid. How was it possible then for the circuit court in the face of the decision of the Supreme Court, to refuse the plaintiff's instruction No. 5, or give defendant's instruction No. 1? That the decision of the Supreme Court on the first appeal was binding, was fully appreciated by the Land Company when it made the allegation hereinbefore quoted in its amended and supplemental bill, in the chancery suit against Laidley, and entered into the agreement of record dated September 5, 1888, wherein it stipulated that judgment should be entered in favor of Laidley in the ejectment suit, if the chancery suit was affirmed on appeal.

By the decision of this court, had the Land Company only waited to present the federal question in a petition for a rehearing of the first appeal, supposing such a petition to have been filed, it would have been too late (139 U. S. 293; 137 U. S. 48.) What then shall be said of a delay of three years, and then presented in an effort to make the lower court overrule the Supreme Court of the State and to disobey its plain mandate?

The prosecution of this writ of error in the Supreme Court of the United States can only be characterized as frivolous.

Sixth. That there is nothing in the pretended federal question presented by the plaintiff in error, and that the acknowledgement was fatally defective as to Mrs. Pennybacker and the deed void as to her we respectfully refer this Court to the opinion in 30 W. Va. 505, where all the cases relied upon by it, were carefully reviewed and considered by the Supreme Court of West Virginia.

REPLY TO THE BRIEF OF THE PLAINTIFF IN ERROR.

TIME OF RAISING THE SUPPOSED FEDERAL QUESTION.

Counsel for the plaintiff in error claim that the presentation of the supposed federal question at the fourth trial (1890) of the cause was in time. This we controvert.

They concede, that it does not appear in the record that any federal question was presented to the Supreme Court of West Virginia upon the first appeal, when it held the Pennybacker deed to Huntington *invalid*, but they say that the Land Co. was not bound to present the federal question at that time, because no writ of error lay from this Court to that decision, it not being a final judgment in the case. The fallacy in this argument is apparent. The question is *not* whether a writ of error then lay to that judgment of the Supreme Court of Appeals of West Virginia, but whether that was not *necessarily the proper time to raise the federal question in the highest Court of the State.* It has been uniformly held in this Court that both the letter and reason of the 25 section of the judiciary act require that the record must affirmatively show that the federal right or privilege was specially claimed in the State Court, and brought to its attention for decision and actually decided. This *ex necessitate* demands that the presentation of the federal question shall *not* be *deferred* until *after* the decision of the State Court has become *final* and *binding upon itself.* It is not the *last* decision of the Supreme Court of West Virginia, which this Court is called upon to reverse, but its *former decision* holding the Huntington deed to *be invalid*, and it is asked to review and reverse that *former decision* upon a record which does not affirmatively show that any right or privilege under the Constitution of the United States was ever set up or claimed by the plaintiff in error at that time. We have already pointed out, that when the term ended at which that decision was pronounced, it was *beyond* the *power of the Supreme Court to reconsider its judgment.* Is it not clear, then, that the question of when the writ of error must be taken to this Court, does not at all control the time when the federal question must be presented to the State Court?

As said by Chief Justice Fuller in the case of Calfornia Powder Works *vs.* Davis, 151 U. S., 389:

"It is axiomatic that in order to give this Court jurisdiction on writ of error to the highest court of a State in which a decision in the suit can be had, it must appear affirmatively not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any federal question that may also have been presented. *Eustis* v. *Bolles*, 150 U. S. 361. It is equally well settled that where our jurisdiction depends upon the denial by a State Court of a title, right or immunity claimed under the constitution, or any

treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the *proper time* and in the proper way. And that the decision was against the right so set up or claimed. *Schuyler Nat. Bk.* v. *Bollong, supra.*"

THE "HINTON" AGREEMENT.

The plaintiff in error insists that Laidley, having moved the court below to enter judgment upon this agreement, and the court having refused to do so, he lost his right under it.

This position we controvert.

The action was ejectment. Under the Code of West Virginia, the defendant could either demur or plead. But if he pleaded, he could only plead the general issue.

(Code West Va., ch. 90, sec. 13.)

Before the agreement of September 5th, 1888, the defendant *had* pleaded the general issue. When the case was called for trial in September, 1890, the question arose whether the court should enter judgment on the Hinton agreement without the intervention of a jury or further trial, or should permit the agreement to go to the jury as part of the Plaintiff's case. Upon argument the court held the latter view and overruled the motion to enter judgment without the intervention of the jury; but permitted the agreement and the record of the chancery cause to be given in evidence to the jury as part of the Plaintiff's case and as a basis for their finding. This trial resulted in a hung jury. Upon the next and last trial, the court, adhering to its former decision, again permitted the "Hinton" agreement and record of the chancery cause to be given in evidence to the jury, which was done, and a verdict rendered for the plaintiff, upon which verdict the judgment now complained of was rendered.

This agreement was made under authority of the statute; was for a valuable consideration, and was entered upon the record of the court. The plaintiff relied upon it on the trial as conclusive of his right of recovery. It was a separate, distinct and independent ground for recovery from that set up upon the first trial in 1884 and involved in the defendant's instructions No. 1 and plaintiff's instructions No. 5. This agreement was itself conclusive of the case and alone fully sustained the finding of the jury and judgment of the court, without reference to the question of the validity of the deed. The defendant below, if any question of a Federal nature ever existed, by the Hinton agreement waived, and for a consideration abandoned it, this agreement being of itself adequate to the verdict and judgment rendered. The language of Chief Justice Fuller already quoted is conclusive against the jurisdiction of this court. See also the authorities cited upon pages 7 and 8 of the brief.

Can the plaintiff in error object to a judgment which it distinctly stipulated for, and agreed, for a consideration, should be

rendered? This is in effect an appeal from a judgment entered by consent; an appeal from a judgment for the plaintiff [illegible] estate in fee simple in the lands in the declaration mentioned, the exact judgment stipulated for in the "History" agreed upon, in event the chancery suit should be decided for Laidley. That fact, previous to the time of the judgment complained of, [illegible] and the evidence of the fact, the record of the chancery suit, was [illegible] the jury in connection with the agreement and became the basis of the verdict.

NO FEDERAL QUESTION.

At common law a married woman could not execute a deed, being under disability. The Virginia Code of 1860, in many respects the same as the West Virginia Code of 1868, removed the disability provided she execute the deed in the manner prescribed by the statute. The statute being in derogation of the common law, the courts of Virginia, before the formation of West Virginia, and the courts of West Virginia since, have held that it must be construed *strictly*, and this rule of construction is practically universal.

Dodge *vs.* Hallingshed, 6. Minn., 25.
Warren *vs.* Brown, 25 Miss., 66.
Jordan *vs.* Corey, 2 Ind., 385.
Dewey *vs.* Campau, 4 Mich., 565.
Rice *vs.* Peacock, 37 Tex., 392.
And cases below.

The following cases, all decided before the decision complained of here, show that the West Virginia courts have been consistent and uniform in maintaining this rule.

Laidley *vs.* Knight, 23 W. Va. 735.
Leftwich *vs.* Neal, 7 W. Va., 569.
Watson *vs.* Michael, 21 W. Va. 568.

In the last case it is held that the words: "And the deed being read to her," are not substantially the same as the words, "being fully explained to her."

In McMullen *vs.* Eagan, 21 W. Va. 233, it is held that an acknowledgement of a married woman which showed that she had acknowledged the deed with her husband, and then on her privy examination, after having the writing fully explained to her, declared that she had willingly executed the same and does not wish to retract it, is fatally defective because on the privy examination and after the deed was explained to her, it did not appear that she had acknowledged it.

All three of these last mentioned cases were decided *before* the decision complained of.

The case of Blair *vs.* Sayre, 29 W. Va. 605, is directly in point. That case was decided in April, 1887, and the case complained of in November following. The point decided is exactly the same.

In Laidley *vs.* Land Co., 30 W. Va. 505, one *syllabi* is as follows:

"The fourth point in the syllabus of the case of Blair *vs.* Sayre, "29 W. Va. 604, approved and re-affirmed."

And the fourth point in the syllabus referred to expressly holds such an acknowledgment as the one in question fatally defective. But it is respectfully submitted that the able and exhaustive review of Judge Snyder, who delivered the opinion in Laidley *vs.* Land Co. (30 W. Va. 505) needs no defense at our hands. He reviews every case relied upon by plaintiff in error—both the Virginia and West Virginia decisions—and follows and applies them. Instead of adopting a new rule of construction, he adheres to the former decisions. And the Supreme Court of Virginia, in Hockman *vs.* McClanahan, 87 Virginia Rep. 33, decided since this case, reviews the case of Blair *vs.* Sayre and approves it.

Now may we ask, in considering the inquiry whether or not the Supreme Court of West Virginia has deliberately changed front and delivered an opinion diametrically opposed to the former adjudications in Virginia and West Virginia, can there be, upon that proposition, any better authority than the Supreme Courts of the two States? Both expressly hold that they do not change the former rule but adopt and follow it, and this Court has held that it is bound by the ruling of the Supreme Court of a State as to what its decision is based upon.

St. Paul M. & M. Ry. Co. *vs.* Todd Co., 142 U. S. 282.

THE SUPPOSED FEDERAL QUESTION.

If a change in rule of construction as claimed by the plaintiff in error has been made by the Courts (which is denied) then, the question plainly stated is: Has this Court jurisdiction to review the judgment of the Supreme Court of a State upon the ground that the judgment complained of does not give the same effect to a contract which had been given to similar contracts by decisions of the State Court prior to the time the contract was made? Or, to apply the question to this case, prior to the 25th day of February, 1870, the law governing the acknowledgments of married women was the Code of West Virginia of 1868.

On February 25th, 1870, the deed and the acknowledgment in question were executed. Assuming for the argument, that under the decisions of the Supreme Court of Virginia and West Virginia prior to February 25, 1870, such acknowledgments had been held good to pass the title of a *feme covert*; and that after February 25th, 1870, the Supreme Court of West Virginia had changed its rule and decided such acknowledgments to be fatally defective and not to pass title:

Is such last mentioned decision a *law* within the meaning of the constitutional inhibition against the State's *passing* a law impairing the obligation of a contract, so as to give this Court jurisdiction to review the judgment of the highest Court of a State, because

"there is drawn in question the validity of a statute of, or an "authority exercised under, any State, on the ground of their "being repugnant to the Constitution, treaties or laws of the United "States, and the decision is in favor of their validity?"

In other words, does the phrase "validity of a statute of any State," as used in the 25th section of the judiciary act, mean also "validity of a decision of the Courts of a State?"

The plaintiff bases the jurisdiction of this Court upon the authority of

Douglass *vs.* County of Pike, 101 U. S. 677.
Gelpcke *vs.* Dubuque, 1 Wall. 175.
Chicago *vs.* Selden, 9 Wall. 678.
Olcott *vs.* Supervisors, 16 Wall. 678.
Anderson *vs.* Santa Anna, 116 U. S. 356.
Chicago Life Ins. Co. *vs.* Needles, 113 U. S. 574.

All of these cases, except the last, were appeals from, or writs of error to, the Circuit Courts of the United States. They did not involve the jurisdiction of this Court to review the judgment of the court of highest resort in a State under the 25th section of the Judiciary Act.

In these cases the Court simply announced the doctrine that in a case in which it *had jurisdiction* it would not follow a decision of the highest Court in a State where such decision was in conflict with the opinion of this Court, as well as in conflict with former decisions of the highest Court in such State, under which latter contract rights had been acquired.

The case of Chicago Life Ins. Co. *vs.* Needles, was a writ of error to the Supreme Court of the State of Illinois. There was involved directly the question whether or not a State *statute*, to which the State Court had given validity, impaired the obligation of a contract.

The case of Mobile & O. R. Co. *v.* Tennessee, 14 Sup. Ct. Rep. 968, was also a writ of error to the Supreme Court of Tennessee. The defense interposed and which raised the Federal question was that the *revenue statutes* of the State enacted subsequent to the granting of the charter, and under which the taxes sought to be collected were levied, impaired the obligation of the contract contained in the R. R. company's charter, and were therefore unconstitutional and void. The *statute* of the State, and not the *decisions of its courts*, infringed the vested right of the appellant.

We have found no case where this Court has held, that a decision of the Court of last resort in a State is a "law" within the meaning of that clause of the constitution inhibiting a State from *passing* a "law" violating the obligation of a contract, as applied to the 25th section of the Judiciary Act giving this Court jurisdiction to review the judgment of the highest court of a State.

This court has repeatedly held to the contrary.

As said by Justice Miller in the case of Knox *vs.* Exchange Bank, 12 Wall. 379:

"This court is not authorized by the judiciary act to review the judgment of "the State courts, because their judgments refuse to give effect to valid contracts, "or because such judgments, in their effects impair the obligation of con- "tracts." 12 Wall. 379.

"*In order to come within the provision of the Constitution of the "United States, which declares that no State shall pass any law im- "pairing the obligations of a contract, not only must the obligation "of a contract have been impaired, but it must have been impaired "by a law of the State. The prohibition is aimed at the legislative "power of the State and not at the decision of its courts, &c.*

"*This Court, therefore, has no jurisdiction to review the judg- "ment of the highest court of a State on the ground that the obli- "gation of a contract has been impaired, unless some legislative act "of the State has been upheld by the judgment sought to be reviewed.*"

New Orleans Water Works Co. *vs.* La. Sugar Ref. Co., 125 U. S. 18.

"A decision of a State Court is not a law within the meaning of the provision "of the U. S. Constitution, which declares that no State shall pass any law im- "pairing the obligation of contracts."
Brown vs. *Smart*, 145 U. S. 455.

In the case of Mississippi and Missouri R. R. Co. *vs.* Rock, (4 Wall. 177,) which was on a writ of error to the Supreme Court of Iowa, the distinction between the rule applied by this Court on appeal from the Circuit Court of the United States, when this Court had jurisdiction of the case, and the rule applied where the same matter was urged as a ground of jurisdiction to review the judgment of the Supreme Court of a State is clearly put. In that case, counsel for the plaintiff in error cited the case of Havemeyer *vs.* Iowa Co., (3 Wall. 294) wherein this Court, on certificate of division in opinion between the judges of the Circuit Court of the United States, for the District of Wisconsin, had upheld the rule laid down in Gelpcke *vs.* Dubuque, *supra;* and counsel insisted upon applying that same rule as the ground of jurisdiction for reviewing the judgment of the State Court. The language of this Court in that case, states the point here:

The whole case, in the language of the brief, is put upon the ground that "the Supreme Court of Iowa has made a decision in this case which impairs "the obligation of contracts;' and the argument goes upon the fundamental "error that this Court can, as an appellate tribunal, reverse the decision of a "state court, because that court may hold a contract to be void which this "Court might hold to be valid. * * * * This, obviously, was not the "purpose of the Judiciary act. It must be the constitution, or some law of the "state, which impairs the obligation of the contract, or which is otherwise in "conflict with the Constitution of the United States; and the decision of the "State court must sustain the law or Constitution of the State in the matter in

"which the conflict is supposed to exist, or the case for this Court does not
"arise."

Again:

"The judgment of a state court, construing a contract, is not reviewable by
"this Court, unless, under said provision of the Constitution and existing
"utes, such judgment, in terms, or by its necessary operation, gives effect
"some provision of the State Constitution or legislative enactment, which
"claimed by the unsuccessful party to impair the obligation of the particular
"contract in question." *Lehigh Water Co. vs. Easton*, 121 U. S.

The case of St. Paul, M. & Ry. Co. *vs.* Todd Co., 142 U. S. 282, is also directly in point. That was a writ of error to the Supreme Court of Minnesota. The ground of jurisdiction claimed was, that the Minnesota court had decided that the terms of the contract (charter) did not embrace the lands in question. The plaintiff in error contended that this violated the obligation of a contract and hence gave this court jurisdiction, *exactly* what is *claimed as the basis of jurisdiction in this case.* But this court held that it

"Cannot review judgments of State courts on the ground that such judg-
"ments refused to give effect to valid contracts or impair the obligation of con-
"tracts; it is only where the obligation of a contract has been impaired by law
"of the State that this court can review the case."

See Morley *vs.* Lake Shore & M. S. R. Co. 146 U. S. 162, where the later decisions on this point are re-affirmed.

See also Harvard Law Review for February, 1895, p. 347.

The true distinctions between the cases cited and those relied upon by the plaintiff in error are: (1) That in cases where the controversy arose in the United States Court and State decisions in similar *cases* are offered as authority to guide the court, the United States Courts will not treat such authorities as binding where there has been a change by the State Court of its rule after the cause of action arose, thus in no sense involving a question of jurisdiction under the 25th section of the judiciary act, where the decision of the question *in the particular case* is involved.

(2) Where the *constitutionality* of an *act of the Legislature* is involved, and not its *construction*, then this court may, on direct appeal, review such decision if the State court shall have sustained the act against a right claimed under the Constitution of the United States.

In the case at bar the sole point involved in the supposed Federal question is whether or not the Supreme Court of West Virginia rightly *construed* the married woman's act of 1868, under which the acknowledgment in question was taken.

The Act was passed in 1868, the acknowledgment was taken in 1870; meanwhile no case involving the construction of the act had ever been before the courts. The first decision upon it was that

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Supreme Court, U. S.
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OCTOBER TERM, 1894.

No. 239.

THE CENTRAL LAND COMPANY OF WEST VIRGINIA, PLAINTIFF IN ERROR,

vs.

JOHN B. LAIDLEY.

Additional Authorities for Defendant in Error.

On the question of the jurisdiction of this Court, the case of Lehigh Water Co. *vs.* Easton, 121 U. S., page 388, is cited. By mistake this is referred to in the brief as 122 U. S.

On the question of the authority of the attorneys to enter into the stipulation to allow judgment to be entered (Record, page 226), see—

Smith *vs.* Barnes, N. Y. Supp., 692.
Ives *vs.* Ives, *ibid.*, 1033.
Dilworth *vs.* Curtis, 29 N. E. (Ill.), 861.
Eidam *vs.* Finnegan, 50 N. W. (Minn.), 933.
Scorritt Furniture Co. *vs.* Moser, 48 Mo. App., 543.

Respectfully,

J. F. BROWN,
W. E. CHILTON,
For Defendant in Error.

MARCH 29, 1895.